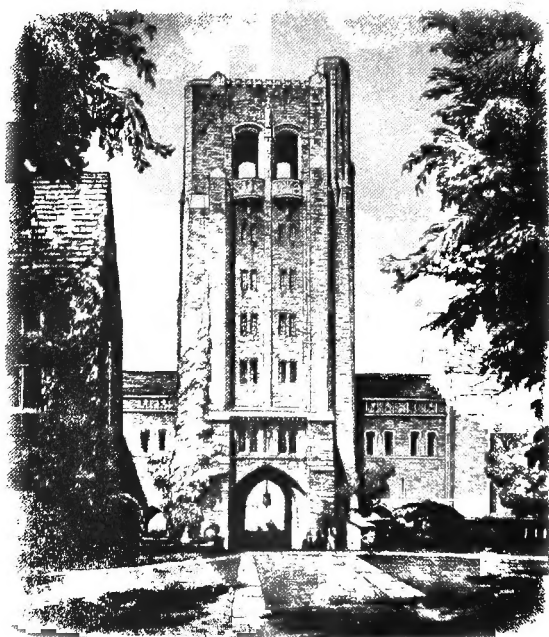


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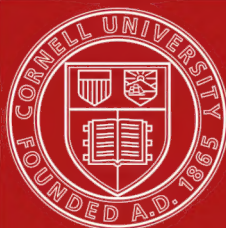
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N.Y. Supreme Court Reports,

Vol. 8.

(HUN'S REPORTS. Vol. I.)

CONTAINING

GENERAL TERM DECISIONS,

From March to August, 1874.

N. Y. Supreme Court Reports, Vol. 9 (Hun's Reports, Vol. 2) will be published December 1st.

MARCUS T. HUN having been appointed Official Reporter of the New York Supreme Court, succeeding Mr. ABRAHAM LANSING, these Reports will be the

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STATE OF NEW YORK.

OFFICE OF THE SECRETARY OF STATE, }
Albany, April 13th, 1874. }

It is hereby Certified, That MARCUS T. HUN was, on the 7th day of January, 1874, appointed under Chapter Ninety-nine, Laws of 1869, as Supreme Court Reporter, in the place of ABRAHAM LANSING, resigned, and that the said MARCUS T. HUN took and subscribed the constitutional oath of office before me, as such Supreme Court Reporter, on the tenth day of January, 1874.

Witness my hand, at the City of Albany, the day above written.

DIEDRICH WILLERS, Jr.,

Secretary of State.

LETTERS OF RECOMMENDATION.

From the HONORABLE IRA HARRIS, LL. D., *Ex-Justice of the Supreme Court, and Professor in the Law Department of the Union University.*

I have examined a treatise on the Law and Practice relating to Warrants and Attachments by Sidney J. Cowen, with great care and much pleasure. The treatise is clear and simple, and will prove very useful to the members of the legal profession.

IRA HARRIS.

ALBANY, *Sept.* 26, 1874.

From the HONORABLE AUGUSTUS BOCKES, *Justice of the Supreme Court.*

Having examined the work above alluded to by Judge Harris, I concur with him in opinion as to its merits, and value to the profession.

A. BOCKES.

SARATOGA SPRINGS, *Oct.* 1, 1874.

From the HONORABLE JOHN K. PORTER, *Ex-Judge of the Court of Appeals.*

Mr. Cowen's work on Warrants and Attachments is one which commends itself to the favor of the profession. The treatise is comprehensive, clear and concise, and it evinces discrimination as well as diligence and research on the part of the author. The publication seems to me useful and timely, and its value is increased by the reprint of the leading cases on these subjects, in a compact and convenient form.

JOHN K. PORTER.

NEW YORK, *Nov.* 7, 1874.

A TREATISE

ON THE

LAW AND PRACTICE

RELATING TO

WARRANTS AND ATTACHMENTS,

WITH

FORMS, AND A RE-PRINT OF ALL THE REPORTED CASES
BEARING UPON THE SUBJECT.

By ^{Joseph} SIDNEY J. COWEN,
ATTORNEY-AT-LAW.



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To THE HON. W. A. BEACH:

Permit me to inscribe this volume with your name, in token of my grateful appreciation of the many kindnesses extended to me, and the partial praise which has encouraged me in the prosecution of this work.

Moreover, I desire the ornament and weight of your name for this volume, as an expression of your indorsement of its usefulness.

Your affectionate nephew,

SIDNEY J. COWEN.

Saratoga Springs, December, 1874.

P R E F A C E .

THE purpose of this work is to present in One Volume all the law relating to Warrants and Attachments, and the practice under that law. All of the Revised Statutes, the Law of 1831 and its amendments, and the Code, that relate to these subjects, are given *in extenso*, and about two hundred and fifty reported cases in which the principles of those laws have been applied, are for the first time collected, the whole thus forming a complete library in itself on the subject treated. The need of such a work has long been felt by the members of the legal profession ; and its usefulness especially to justices of the peace, upon whom is imposed the responsible duty of administering the complicated laws of which it treats, will not, I think, be questioned. The author submits the work, in the hope at least, that sufficient of practical utility may be found in its pages to make amends for its, doubtless, many, imperfections.

WARRANTS AND ATTACHMENTS.

REVISED STATUTES,

PART III, CHAPTER II, TITLE IV, ARTICLE II.

(*Vol. 3, 5th ed., page 427.*)

§ 9. (Sec. 11.) Suits may be instituted before a justice, either by the voluntary appearance and agreement of the parties, or by process; when by process, it shall be either a summons, a warrant or an attachment.

§ 10. (Sec. 12.) Suits shall be considered as commenced at the times following:

1. Upon process by warrant, at the time of the arrest of the defendant;

2. Upon process by attachment or summons, on the day when the process shall be delivered to the constable. But if two or more suits be commenced by summons or attachment on the same day, the suit in which the process was first served shall be deemed to have been first commenced;

3. Where the suit is instituted without process, at the time of the parties joining issue.

§ 11. (Sec. 13.) The first process against freeholders, and against inhabitants having families, except as is otherwise hereinafter directed, shall be a summons; but no person shall be proceeded against by summons out of the county in which he resides.

§ 12. (Sec. 14.) A summons shall be directed to any constable of the county where the justice resides, commanding him to summon the defendant to appear before the justice who issued the same, at a time and place to be named in such summons, not less than six nor more than twelve days from the date of the same, to answer the plaintiff in the plea in the same summons to be mentioned.

§ 13. (Sec. 15.) A summons shall in all cases be served at least six days before the time of appearance mentioned therein ; if the defendant shall be found it shall be served by reading the same to the defendant, and (if required by him) delivering a copy thereof. If the defendant shall not be found, it shall be served by leaving a copy thereof at the defendant's last place of abode, in the presence of some one of the family, of suitable age and discretion, who shall be informed of its contents.

§ 14. (Sec. 16.) The constable serving a summons shall return thereupon, in writing, the time and manner in which he executed the same, and sign his name thereto.

§ 15. (Sec. 17.) A justice shall, upon application, issue a warrant in the following cases :

1. Where the defendant is a non-resident of the county ;
2. Where the plaintiff is a non-resident, and tenders to the justice security for the payment of any sum which may be adjudged against him in the suit ;
3. When it shall appear to the satisfaction of the justice, by the affidavit of the applicant, or of any other witness, that the person against whom such warrant is desired is about to depart from the county, with intent not to return thereto ;
4. Where the defendant is an inhabitant of the county, having a family, or a freeholder of the same county, and it shall in like manner appear to the satisfaction of the justice that the plaintiff will be in danger of losing his debt or demand unless such warrant be granted.

§ 16. (Sec. 18.) A justice may, upon application, issue either a summons or warrant, at his option :

1. Against a defendant residing in the same county, who is neither a freeholder of the county nor an inhabitant having a family ;
2. Against the defendant upon whom a summons shall have been served only by leaving a copy, or in any other way than by leaving or delivering a copy to him personally, and who shall not have appeared at the time and place appointed in such summons, nor show good cause for not appearing. But the suit instituted by such summons shall be deemed discontinued, unless the warrant be issued on the same day of the return of the first summons, and,

if so issued, the suit shall be deemed to have been continued thereby.

§ 17. (Sec. 19.) In all cases on application for a warrant, except where the suit shall have been commenced by summons, the person applying shall, by affidavit, state the facts and circumstances within his knowledge showing the grounds of his application, whereby the justice may the better judge of the necessity and propriety of issuing such warrant.

§ 18. (Sec. 20.) A warrant shall be directed to any constable of the county where the justice issuing the same resides, and shall command such constable to take the defendant, and bring him forthwith before such justice, to answer the plaintiff in a plea, in the same warrant to be mentioned; and shall further require the constable, after he shall have arrested the defendant, to notify the plaintiff of such arrest.

§ 19. (Sec. 21.) A warrant shall be served by arresting the defendant and taking him forthwith before the justice issuing the same. If such justice be, on the return thereof, absent, or unable to hear or try the cause, or it shall be made to appear to such justice, by the affidavit of such defendant, that such justice is a material witness in the cause, the constable shall take the defendant before the next justice of the city or town, who shall take cognizance of the cause, and proceed thereon, as if the warrant had been issued by him.

§ 20. (Sec. 22.) Every constable serving a warrant shall return thereupon, in writing, the manner in which he executed the same, and the fact whether he has or has not notified the plaintiff.

§ 21. (Sec. 23.) Whenever an action shall be brought to recover any penalty imposed by law, for taking any rails, boards, planks or staves from the banks or vicinity of a canal, in which a justice is authorized to direct the detention of any canal boat, he shall not indorse such direction on any warrant, unless a bond, as prescribed in the next section, shall be executed and delivered to such justice.

§ 22. (Sec. 24.) Such bond shall be in the penalty of at least one hundred dollars, with one or more sureties, to be approved by such justice, conditioned that such action shall be prosecuted to judgment with all convenient speed, and that if judgment be rendered in favor of the defendant, the obligors will pay the costs and

charges which shall be adjudged against the plaintiff, and all damages which may ensue from the detention of such boat and the cargo thereof, and the crew navigating the same.

§ 23. (Sec. 25.) When a defendant shall be brought before a justice on a warrant, he shall be detained in the custody of the constable until the justice shall direct his release. But in no case shall the defendant be detained longer than twelve hours from the time he shall be brought before the justice, unless within that time the trial of the cause shall be commenced; or unless it shall be delayed at the instance of the defendant.

§ 24. (Sec. 26.) An attachment against the property of any debtor, may be issued on the application of a creditor, in the manner hereinafter prescribed, whenever it shall satisfactorily appear to the justice that such debtor has departed, or is about to depart, from the county where he last resided, with intent to defraud his creditors, or to avoid the service of any civil process, or that such debtor keeps himself concealed with the like intent. *See chap. 300, Laws of 1831, sec. 34.*

§ 25. (Sec. 27.) Such application may be made by any creditor, or by his personal representatives, having a demand against such debtor personally, whether liquidated or not, arising upon contract, or upon a judgment rendered within this State, amounting to one hundred dollars or any less sum. *Jurisdiction enlarged by sec. 53 of the Code, sub. 4; also see sec. 71 of the Code as to judgments.*

§ 26. (Sec. 28.) Such application shall be in writing, and shall be accompanied by the affidavit of the creditor, or of his agent, in which shall be specified, as near as may be, the sum in which the debtor is indebted, over and above all discounts, to the person in whose behalf application is made, and the grounds upon which the application is founded; and the facts and circumstances to establish such grounds shall also be verified by the affidavits of two disinterested witnesses; and it shall be the duty of the justice, on being requested so to do, to issue his subpoena to compel the attendance of any witness forthwith, to make such affidavit. *Modified. See sec. 35, chap. 300, Laws of 1831.*

§ 27. (Sec. 29.) The applicant shall execute to the defendant,

and deliver to the justice, a bond with sufficient surety, to be approved by such justice, in writing upon such bond, in the penalty of two hundred dollars, conditioned to pay such defendant all damages and costs which he may sustain by reason of the issuing such attachment, if such plaintiff fail to recover judgment thereon; and if such judgment be recovered, that such plaintiff will pay the defendant all moneys which shall be received by him from any property levied upon by such attachment, over and above the amount of such judgment, and interest and costs thereon. *See sec. 35, chap. 300, Laws of 1831.*

§ 28. (Sec. 30.) Every such attachment shall state the amount of the debt sworn to by the applicant, and shall command any constable of the county in which the justice resides, to attach so much of the goods and chattels of the debtor, as will be sufficient to satisfy such debt; and safely to keep the same, in order to satisfy any judgment that may be recovered on such attachment; and to make return of his proceedings thereon to the justice who issued the same, at a time therein to be specified, not less than six, nor more than twelve days from the date thereof. *See sec. 36, chap. 300, Laws of 1831.*

§ 29. (Sec. 31.) The constable to whom such attachment shall be directed and delivered, shall execute the same at least six days before the return day; and shall attach, take into his custody and safely keep, such part of the goods and chattels of the defendant as shall not be exempt from execution, and as shall be sufficient to satisfy the demand of the plaintiff. He shall immediately make an inventory of the property seized, and shall leave a copy of the attachment and of the inventory, certified by him, at the last place of residence of the defendant; but if the defendant have no place of residence in the county where the goods and chattels are attached, such copy and inventory shall be left with the person in whose possession the said goods and chattels shall be found. *See sec. 36, chap. 300, Laws of 1831.*

§ 30. (Sec. 32.) No goods attached by a constable shall be removed by him, if a bond be given and delivered to such constable by any person, with sufficient surety to be approved by the constable, in a penalty double the sum stated in the attachment to have been sworn to by the plaintiff, conditioned, that such goods

and chattels shall be produced, to satisfy any execution that may be issued upon any judgment which shall be obtained by the plaintiff, upon such attachment, within six months after the date of such bond.

§ 31. (Sec. 33.) If any person shall claim any goods or chattels attached by a constable, he may, after such seizure, and at any time before execution shall have been issued upon the judgment obtained on such attachment, execute a bond to the plaintiff, with sureties to be approved by the constable, or by the justice who issued the attachment, in a penalty double the value of the property attached, conditioned that in a suit to be brought on such bond, within three months from the date, such claimant will establish that he was the owner of the goods seized, at the time of such seizure; and in case of his failure to do so, that he will pay the value of the goods so claimed, with interest.

§ 32. (Sec. 34.) Upon either of the bonds aforesaid being executed and delivered to the constable, he shall deliver up the property seized by him to the obligor in such bond.

§ 33. (Sec. 35.) The constable serving the attachment shall make a return thereof at the day therein named for that purpose, with all his proceedings thereon in writing, subscribed by him, with a copy of the inventory of the goods attached, certified by him, and with any bond which may have been executed and delivered to him, pursuant to the foregoing provisions.

§ 34. (Sec. 36.) In every suit which shall be brought upon a bond, given by the claimant of property, pursuant to the preceding thirty-third section, the claimant may give in evidence, in bar of a recovery, that he was the owner of the property seized at the time of such seizure. If he fail to establish such ownership, or if judgment pass against him by default or on demurrer, the plaintiff shall recover the value of the property so seized and delivered to such claimant, with interest from the date of the bond, to be assessed as damages.

§ 35. (Sec. 37.) If the amount so recovered exceed the amount of the plaintiff's judgment rendered on the attachment, he shall be liable to refund such excess to the defendant in such attachment.

§ 36. (Sec. 38.) If the defendant shall, before judgment, satisfy the claim on which such attachment issued, and all costs thereon,

or after judgment shall pay the same, he shall be entitled to maintain an action on the bond executed by such claimant in his own name, in the same manner, and with the like effect, as if such action had been brought by the obligee in such bond as herein provided.

ARTICLE III.

OF THE APPEARANCE OF PARTIES.

§ 37. (Sec. 39.) Any plaintiff in a suit before a justice, except persons under twenty-one years of age, may appear and conduct his suit either in person or by attorney.

§ 38. (Sec. 40.) No process shall be issued for an infant plaintiff, nor shall any issue joined by such plaintiff without process, be heard, until a next friend for such plaintiff shall have been appointed. Whenever requested, the justice shall appoint some suitable person who will consent thereto in writing, to be named by such plaintiff, to act as his next friend in such suit, who shall be responsible for the costs therein.

§ 39. (Sec. 41.) Every defendant in a suit, except persons under twenty-one years of age, may appear and defend the same in person, or by attorney; but where a warrant shall have been served on a defendant and returned, no further proceedings shall be had against him until he shall have personally appeared in court.

§ 40. (Sec. 42.) After the service and return of process against an infant defendant, the suit shall not be any further prosecuted, until a guardian for such defendant be appointed. Upon the request of such defendant, the justice shall appoint some person, who will consent thereto in writing, to be the guardian of the defendant in the defense of the suit. And if the defendant shall not appear on the return day of such process, or if he neglect or refuse to nominate such guardian, the justice may, on the motion of the plaintiff, appoint any discreet person as such guardian.

§ 41. (Sec. 43.) The consent of such next friend or guardian shall be filed with the justice. The guardian for the defendant shall not be liable for any costs in the suit.

§ 42. (Sec. 44.) A party authorized to appear by attorney may appoint any person to act as such attorney; but the constable who

served either the original or jury process in the cause shall not appear and advocate for either party at the trial, but may act as attorney in any other stage or proceeding in the cause.

§ 43. (Sec. 45.) The authority to appear by attorney may be either written or verbal, and shall in all cases be proved, either by the attorney himself or other competent testimony, unless admitted by the opposite party; and the justice shall not permit any person to appear for another without such proof or admission.

§ 44. (Sec. 46.) Upon the return of a summons personally served, or on the return of an attachment duly served, the justice shall wait one hour after the time specified for the return of such process, unless the parties shall sooner appear.

§ 45. No suit brought or action commenced in any of the justices' courts of the city of New York, shall abate or be discontinued by reason of the absence of any of the assistant justices in said city, from their usual respective places of holding the said courts, on the return day of any process, or upon the day to which any cause or proceedings shall have been adjourned; but the clerks of said courts respectively shall have power to adjourn such cases to such time as the said assistant justice shall be in attendance upon said court: *provided, however*, that such adjournment shall exceed, at no one time, six days, without the mutual consent of parties to the suit. *Laws of 1840, chap. 170.*

ARTICLE IV.

OF PLEADINGS AND OF SET-OFFS.

§ 46. (Sec. 47.) At the time of the first appearance of the parties before the justice, either upon the return of process or their voluntary appearance to join issue, the pleadings of the parties shall be made and issue joined; and when both parties shall have appeared on the return of process, an issue shall be joined before any adjournment shall be had, except when the defendant shall refuse or neglect to plead. *As amended 1845, chap. 25.*

§ 47. (Sec. 49.) The pendency of a suit commenced by summons shall not be a bar to a subsequent suit commenced by warrant

between the same parties, if it appear on the trial of such subsequent suit that the defendant therein was about to abscond from the county when such warrant issued.

ARTICLE V.

OF ADJOURNMENTS.

§ 57. (Sec. 67.) At the time of the return of either a summons or attachment, or of joining issue without process, a justice may, in his discretion, and with or without the consent of parties, adjourn the cause not exceeding eight days.

§ 58. (Sec. 68.) A justice shall in no case adjourn a cause commenced by warrant, on his own motion, nor shall he exercise that right in a suit commenced by summons or attachment, at any other time than on the return of such summons or attachment.

§ 59. (Sec. 69.) At the time of the return of a summons or attachment, or the joining of issue without process, the justice shall, on the application of the plaintiff, adjourn the cause to some time to be fixed by the justice, not exceeding eight days thereafter. But such adjournment shall not be granted, unless the plaintiff or his attorney shall, if required by the defendant, make oath that he cannot, for want of some material testimony or witness, safely proceed to trial.

§ 60. (Sec. 70.) No adjournment of a cause commenced by warrant, issued at the suit of a non-resident plaintiff, shall be allowed unless in the following cases :

1. On the consent of both parties ; or,
2. On the application of the defendant, supported by his oath, that he has a good defense to the action, and that he is not ready to proceed to the trial thereof ; and in such case it shall not be granted unless the defendant will consent that any witness on the part of the plaintiff, who shall be then attending, may be then examined on oath by such justice, his testimony reduced to writing, certified by the justice and left with him to be read on the trial of the cause ; or,
3. On the application of the plaintiff, supported by his oath, that

on account of the absence of some material witness or testimony he cannot then safely proceed to the trial of the cause.

§ 61. (Sec. 71.) If a cause commenced by warrant be adjourned upon the application of the defendant, he shall continue, during the time of adjournment, in the custody of the constable, unless he shall give the security hereinafter directed to be given in cases of adjournment.

§ 62. (Sec. 72.) If such cause be adjourned on the consent of both parties, or if it be adjourned on the application of the plaintiff, the defendant shall be discharged from custody; but the cause shall not be discontinued by such discharge, and at the adjourned day the same proceedings shall be had as on the return of a summons personally served.

§ 63. (Sec. 73.) The first adjournment of a cause commenced by warrant shall be to a day not less than three, nor more than twelve days thereafter, unless the parties and justice shall otherwise agree.

§ 64. (Sec. 74.) In all cases (other than where the suit shall have been commenced by warrant, at the suit of a non-resident plaintiff) the cause shall be adjourned on the application of the defendant, on his complying with the following requisitions:

1. The application must be made at the time of joining issue;
2. If required by the plaintiff or the justice, the defendant shall make oath that he cannot safely proceed to trial, for the want of some material testimony or witness, to be specified by him;
3. If required by the plaintiff, he shall give security, as herein-after directed;

Such adjournment shall be for such reasonable time as will enable the defendant to procure such testimony or witness, not exceeding ninety days.

§ 65. (Sec. 75.) In all cases a defendant shall also be entitled to a further adjournment, upon giving security, if required, as is directed in the next succeeding section, and upon proving, by his own oath or otherwise, to the satisfaction of the justice, that he cannot safely proceed to trial for want of some material testimony or witness, and that he has used due diligence to obtain such testimony or witness.

§ 66. (Sec. 76.) The security required by any of the preceding sections to be given by a defendant shall be a bond, in the penalty

of one hundred dollars, to the plaintiff in the action, with such surety as the justice shall approve, conditioned that in case judgment shall be given against such defendant at the adjourned day, or at any time thereafter, and execution be issued against his person, he will render himself upon such execution before the return thereof; or, in default thereof, that he or his surety will pay the judgment so recovered, with interest; but if any bond shall have been given upon any prior adjournment, it shall not be necessary to execute a new bond upon a subsequent adjournment, unless such bond be required by the justice, or by the bail of such defendant in such prior bond.

§ 67. (Sec. 77.) In any suit brought upon such bond, the plaintiff shall not be entitled to recover, unless he shows an execution upon a judgment obtained in the suit in which such adjournment was had, duly issued, within ten days after the time when by law the same could be issued against the person of the defendant, and a return thereon that such defendant could not be found.

§ 68. (Sec. 78.) No adjournment shall be allowed, without the agreement of the parties, to a time beyond ninety days from the joining of the issue in the suit.

§ 69. (Sec. 79.) No adjournment shall be allowed in any case to a party applying therefor, who shall have seen the account or demand of the opposite party, unless such applicant, if required, shall exhibit his account or demand, or state the nature thereof, as far forth as may be in his power, to the satisfaction of the justice.

PART I.

CHAPTER IX, TITLE IX, ARTICLE VIII.

(*Vol. 1, 5th ed., page 628.*)

§ 290. (Sec. 169.) If any boatman, or person on board of any boat on any canal, shall take, without right, any rails, boards, planks or staves, fire-wood or fencing posts, from the banks or vicinity of the canal, the master of the boat shall forfeit to the owner, treble the value of the property taken, and the possession of such property on board the boat, shall be presumptive evidence of such taking. *As amended by chap. 117 of Laws of 1830.*

§ 291. (Sec. 170.) Any person or boatman who shall violate the provisions of the last section, shall forfeit twenty-five dollars to any person who will prosecute therefor.

§ 292. (Sec. 171.) Every penalty and forfeiture, prescribed by this article, and which is declared to be recoverable against the owner, master, boatman, navigator, or other person, having charge of any boat or other float, when incurred, shall be chargeable on such boat or float, and a suit for the recovery thereof, may be brought against any person, being in the possession, or having the charge, of such boat or other float, at the time such suit is commenced.

§ 293. (Sec. 172.) When any suit shall be prosecuted for any such penalty or forfeiture, the magistrate issuing the process, by a clause to be inserted therein, may direct the officer executing the same to detain such boat or float, and the furniture and horses belonging thereto, until the suit shall be determined, or until adequate security shall be given for the payment of any judgment that may be recovered.

§ 294. (Sec. 173.) If such security shall be given, or the defendant in such suit shall prevail, the magistrate shall order the boat or other float and property detained, to be released; but if no such security shall be given, and a judgment shall be recovered for such penalty or forfeiture, and the same, together with the costs, shall not be immediately paid, an execution shall be issued,

under which the property so detained may be sold, in like manner, as if the judgment had been obtained against the owner thereof.

§ 295. Weighmasters on the State canals and (collectors of tolls) are hereby authorized to administer oaths when it becomes necessary in the discharge of their duties. 1847, *chap.* 278, § 15.

PART I.

CHAPTER IX, TITLE IX, ARTICLE II.

(*Vol. 1, 5th ed., page 639.*)

§ 349. (Sec. 188.) All suits for penalties and forfeitures imposed in any article of this title, or for damages, in behalf of the State, shall be prosecuted in the name of the people of this State, by such persons and in such manner as the commissioners of the canal fund, in their regulations shall direct; and all moneys recovered therein, shall be accounted for and paid over to such commissioners.

§ 350. (Sec. 189.) Every such penalty or forfeiture, not exceeding the sum of fifty dollars, may be recovered before any justice of the peace in any county.

§ 351. (Sec. 190.) The term "float," as used in this title, shall be construed to embrace every boat, vessel, raft, or floating thing, navigated on the canals, or moved thereon, under the direction of some person having the charge thereof; and the term "master," as so used, shall be construed to apply to every person, having for the time, the charge, control, or direction, of any such float.

§ 352. (Sec. 191.) If any person against whom any forfeiture shall be recovered under the provisions of this title, shall not immediately pay the full amount of the judgment so obtained, the court by which such judgment shall be given, shall, without delay, issue an execution against his property or person, at the election of the party prosecuting the suit.

§ 353. (Sec. 192.) The imposition or recovery of any penalty or forfeiture, imposed for the violation of any provision of this title, shall not be considered a bar to the recovery of any damages, resulting from such violation, to the State or to individuals.

LAWS OF 1831.

CHAPTER 300.

AN ACT to abolish imprisonment for debt, and to punish fraudulent debtors.

PASSED, April 26, 1831.

§ 30. No execution issued on any judgment rendered by any justice of the peace upon any demand arising upon contract, express or implied, or upon any other judgment founded upon contract, whether issued by such justice or by the clerk of the county, shall contain a clause authorizing an arrest or imprisonment of the person against whom the same shall issue, unless it shall be proved by the affidavit of the person in whose favor such execution shall issue, or that of some other person, to the satisfaction of such clerk or justice, either :

1. That the person against whom the same shall issue, had not resided in this State for the space of thirty days immediately preceding the commencement of the suit upon which such judgment was rendered, or immediately preceding the rendition of such judgment, if the same was rendered upon confession without process (*repealed by chap. 377, Laws 1840, sec. 2*); or,

2. That such judgment was for the recovery of money collected by any public officer; or,

3. For official misconduct or neglect of duty; or,

4. For damages for misconduct or neglect in any professional employment.

§ 31. No warrant shall issue against a defendant in any case in which, by the provisions of the last preceding section, an execution on the judgment recovered, could not be issued against his body, and whenever a warrant in such case shall issue, the like affidavit shall be required as for the issuing of an execution by the provisions of said section.

§ 32. Whenever by the provisions of the last preceding section no warrant can issue, and the plaintiff shall be a non-resident of

the county, and shall give the like proof of the fact, and tender to the justice the security now required by law to entitle him to a warrant, the justice shall issue a summons, which may be made returnable not less than two nor more than four days from the date thereof, and shall be served at least two days before the time of appearance mentioned therein; and if the same shall be returned personally served, the same proceedings shall be had, and no longer adjournment granted than in case of a warrant at the instance of a non-resident plaintiff.

§ 33. Whenever by the provisions of the thirtieth section of this act, no warrant can issue, and the defendant shall reside out of the county, he shall be proceeded against by summons or attachment, returnable not less than two, nor more than four days from the date thereof, which shall be served at least two days before the time of appearance mentioned therein; and if such defendant be proceeded against otherwise, the justice shall have no jurisdiction of the cause.

§ 34. In addition to the cases in which suits may now be commenced before justices of the peace by attachment, any suit for the recovery of any debt or damages arising upon any contract, express or implied, or upon any judgment for fifty dollars or less, may be so commenced, whenever it shall satisfactorily appear to such justice that the defendant is about to remove from the county any of his property, with intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of, or secrete any of his property, with the like intent, whether such defendant be a resident of this State or not. *Jurisdiction enlarged by sec. 53 of the Code. Also see sec. 71 of the Code as to judgments.*

§ 35. Before any attachment shall issue in such case, or in the cases provided for in article second, title fourth, chapter second, part third of the Revised Statutes (3 R. S., 5th ed., p. 430) the plaintiff shall by his own affidavit, or that of some other person or persons, prove to the satisfaction of the justice, the facts and circumstances to entitle him to the same, and that he has such a claim as is specified in the last preceding section against the defendant, over and above all discounts which the defendant may have against him, specifying, as near as may be, the amount of

such claim or the balance thereof; and such plaintiff, or some one in his behalf, shall also execute in the cases provided for by this act, a bond in the penalty of at least one hundred dollars, with such sureties, and upon such condition as is required in section twenty-nine of said article; and so much of said article as requires any other or different proof, for the issuing of an attachment, than that required by this section, is hereby repealed. *See* § 26 (*sec. 28*) *of 3 R. S., 5th ed., p. 430.*

§ 36. Every attachment issued by virtue of this act, or of the provisions contained in the said second article, shall be served in the manner now provided in said article, except that if the defendant can be found in the county, the copy of such attachment and inventory, shall be served upon him personally instead of leaving the same at the place now prescribed in said article; and the return of said officer, in addition to what is now required, shall state specifically whether such copy was or was not personally served upon the defendant. *See* § 28 (*sec. 30*) *of the R. S., 5th ed., p. 431.*

§ 37. If such attachment was issued in one of the cases provided for by this act, and shall be returned personally served upon the defendant, the justice shall, on the return day, proceed to hear and determine the cause in the same manner as upon a summons returned personally served.

§ 38. If such attachment was issued in one of the cases provided for by this act, and at the return-day it shall appear by the return, that property was attached, and that a copy of such inventory and attachment was not personally served, and the defendant shall not appear, the plaintiff may take out a summons against the defendant; and if such summons shall be returned that the defendant cannot be found, after diligent inquiry, or that the same has been personally served upon the defendant, then, in either case, the justice shall proceed to hear and determine the cause in the same manner as upon a summons returned personally served.

§ 39. A judgment obtained before any justice, in any suit commenced by attachment, when the defendant shall not be personally served with the attachment or summons, and shall not appear, shall be only presumptive evidence of indebtedness, in any suit that may be brought thereon, and may be repelled by the defendant;

and no execution issued upon such judgment, shall be levied upon any other property than such as was seized under the attachment issued thereon; nor shall any defendant, in such case, be barred of any set-off which he may have against the plaintiff.

§ 40. A defendant, against whose body, by the provisions of this act, an execution cannot be issued from a justice's court, shall not be required, in order to obtain an adjournment of a cause, to give a bond with the condition now required by law, but instead thereof, the condition of such bond shall be, that no part of his property liable to be taken on execution shall be removed, secreted, assigned, or in any way disposed of, except the necessary support of himself and family, until the plaintiff's demand shall be satisfied, or until the expiration of ten days after such plaintiff shall be entitled to have an execution issued on the judgment obtained in such cause, if he shall obtain such judgment, and if the condition of such bond be broken, and an execution on such judgment be returned unsatisfied in whole or in part, the plaintiff, in an action on such bond, shall be entitled to recover the amount due on such judgment.

§ 41. Sections one hundred and thirty-seven, one hundred and thirty-eight and one hundred and thirty-nine, of title fourth, chapter second and part third of the Revised Statutes are hereby repealed.

§ 42. When judgment shall be rendered against the defendant, no more than two summonses, and the service of two summonses, shall be included in the costs of such judgment.

§ 43. All the provisions of said title fourth, not hereby expressly repealed and not inconsistent with the provisions of this act, are hereby declared to be in full force, and to apply to the provisions of this act, so far as the same relate to proceedings in courts before justices of the peace.

CHAPTER 377.

AN ACT further to amend the act, entitled "An act to abolish imprisonment for debt and to punish fraudulent debtors," passed April, 26, 1831.

PASSED May 14, 1840.

§ 2. The first subdivision of the thirtieth section of the said act is hereby repealed.

CHAPTER 107.

AN ACT to amend the act entitled "An act to abolish imprisonment for debt, and to punish fraudulent debtors," passed April 26, 1831.

PASSED March 29, 1842.

§ 1. Section thirty-four of the act entitled "An act to abolish imprisonment for debt, and to punish fraudulent debtors," passed April 26, 1831, is hereby amended so as to read as follows:

§ 34. In addition to the cases in which suits may now be commenced before justices of the peace by attachment, any suit for the recovery of any debt or damage arising upon any contract express or implied, or upon any judgment for one hundred dollars or less, may be so commenced, whenever it shall satisfactorily appear to said justice that the defendant is about to remove from the county, any of his property, with intent to defraud his creditor, or has assigned, disposed of, secreted, or is about to assign, dispose of, or secrete any of his property, with the like intent, whether such defendant be a resident of this State or not. *Jurisdiction enlarged by sec. 53 of the Code. Also see sec. 71 of the Code as to judgments.*

§ 2. Section second of the act entitled "An act concerning justices' courts," passed May 14, 1840, is hereby repealed.

CODE OF PROCEDURE.

Section 71, provides as follows: "No action shall be brought upon a judgment rendered in any court of this State, except a court of a justice of the peace, between the same parties, without leave of the court for good cause shown, on notice to the adverse party; and no action on a judgment rendered by a justice of the peace, shall be brought in the same county within five years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties, or where the docket or record of such judgment is or shall have been lost or destroyed."

Section 53, sub. 4, extends the jurisdiction of justices to actions "commenced by attachment of property, as now provided by statute, if the debt or damages claimed do not exceed two hundred dollars."

OF PROCESS BY WARRANT.

The Law of 1831, as amended by the Law of 1840, so modifies the provisions of the Revised Statutes for the issuance of warrants, as to restrict that process to demands *not arising upon contract*, and to a few exceptional cases of demands *arising upon contract*, enumerated in the law; so that now, the same as before the passage of this law, a warrant issues, provided a proper case for this kind of process exists, in actions for,

1. Torts; and, under the restrictions of the Law of 1831, for,
2. The recovery of money collected by a public officer;
3. Official misconduct or neglect of duty;
4. Damages for misconduct or neglect in any professional employment.

Therefore, it will be seen that warrants may issue, the other requirements of the statute being complied with, for all trespasses upon real estate or injury to personal property, by cattle or beasts, or by defendant in person, or by a third party under his direction; for all wrongful conversions of property; for frauds; for the recovery of any penalty or forfeiture under a general statute of the state. *Code*, § 53, *sub. 2, sub. 3, sub. 9*; *Keeler v. Clark*, 18 *Abb.*, 154; *McDuffie v. Beddoe*, 7 *Hill*, 578. (Whenever process is issued for the purpose of compelling the appearance of the defendant under such statute, there must be indorsed upon such process a general reference to the statute by which such action is given; as, for instance: "According to the provisions of title 9, part 1, chapter 20, of the statute of excise and the regulations of taverns and groceries" [*Perry v. Tynen*, 22 *Barb.*, 137], or, "Issued according to the *proceedings* of title 9, chapter 20, part 1, of the Revised Statutes." *Andrews v. Harrington*, 19 *Barb.*, 343; *Avery v. Slack*, 17 *Wend.*, 85.)

Also, an action may be brought by warrant against a public officer for money collected by him and wrongfully withheld. Under this head are included suits against supervisors, county

treasurers, police justices, justices of the peace, constables, collectors, &c.

An action may be instituted by warrant against an officer who abuses his trust to the injury or damage of another—as where a constable refuses, or neglects, to serve a precept delivered to him, or permits an escape upon a civil process, or makes a false return of any process; or a justice refuses to issue process when properly applied for, &c., &c.

Also, surgeons, physicians, engineers, surveyors, architects, &c., &c., may be proceeded against by warrant, if guilty of negligence or carelessness in their respective professions. A warrant will lie against an attorney for want of diligence and fidelity in the management of a cause to the damage of his client. *Waters v. Whittemore*, 22 Barb., 593.

Where the cause of action is one for which a warrant may issue and the defendant is a non-resident of the county, a warrant is the *only* legal process. *Waters v. Whittemore*, 22 Barb., 593. To this rule there are two exceptions. Section 142, of title 4, of the Revised Statutes (*vol. 3, 5th ed., p. 449*), provides, that “No female shall be arrested or imprisoned upon any execution issued from a justice’s court.” Therefore, although the cause of action be for a tort, and the female defendant be a non-resident of the county, a warrant should not issue. The second exception is in actions for the recovery of the possession of personal property. In such an action a summons is the proper process.

By a reference to section 11 (sec. 13) of the Revised Statutes, it will be seen, that “The first process against freeholders and against inhabitants having families, *except as is otherwise hereinafter directed*, shall be a summons; but no person shall be proceeded against by summons out of the county in which he resides.” The exceptions which direct otherwise, are found in section 15 (sec. 17), but the justice must bear in mind that unless, *even under these exceptions, the cause of action calls for a warrant*, no warrant can issue. Subdivision 2, of section 16 (sec. 18), provides another exception; which section see. By reference to *N. Y. & Erie R. R. Co. v. Purdy*, 18 Barb., 574, and *Wheeler v. N. Y. & H. R. R. Co.*, 24 Barb., 414, it will be seen that the constable’s return is presumptive evidence of what it states and is, therefore, of itself, suffi-

cient evidence to justify, under said subdivision 2, the issuance of a warrant. The return of the constable should be, in substance, as follows :

I hereby certify that I served the within summons on the within named defendant, by leaving a copy of the same at his last place of abode, with his son, he being of suitable age and discretion, on the 13th day of December, 1873, at the town of Saratoga Springs, county of Saratoga ; and said summons was not personally served.

FREDERICK A. JOHNSON,

Constable.

It will be seen by an examination of subdivision 2, of section 16 (sec. 18) of the Revised Statutes, that the suit commenced by a summons not personally served, may be continued, either by warrant or by a second summons, issued upon the return day. If the defendant appear on the return day of the first summons, the justice would have no right to issue a warrant. It seems, that a good cause shown for non-appearance will stop the issuance of a warrant. Such cause may be explained by an attorney or some person authorized by the defendant. The justice may require that such person be sworn for the purpose of proving the reasons for the non-appearance of the defendant. The oath may be, in substance, as follows : " You do solemnly swear that you will truly answer such questions as may be put to you relating to the non-appearance of the defendant named in this summons at the time and place mentioned for the return thereof." If any good cause is then shown for the non-appearance of the defendant, such as his sickness or the sickness of any member of his family, the warrant is not to be issued. Then another summons must immediately issue if it is desired to continue the action. This second summons must be personally served (as must also be the warrant, if the case calls for its issuance), before a trial can be had and a judgment rendered. If no second summons or warrant issue, the case goes down. *Reed v. Gillett*, 12 *John.*, 296.

Sections 5 and 6, of Article 1, Title II, chap. I, of the Revised Statutes (*Vol. 3, 5th ed., page 10*), provide as follows :

§ 5. Estates of inheritance and for life, shall continue to be denominated estates of freehold; estates for years, shall be chattels real; and estates at will or by sufferance, shall be chattel interests, but shall not be liable as such, to sale on executions.

§ 6. An estate during the life of a third person, whether limited to heirs or otherwise, shall be deemed a freehold only during the life of the grantee or devisee, but after his death it shall be deemed a chattel real.

We see from the foregoing sections, that a freeholder is one having an estate in lands, tenements or hereditaments, to him and his heirs, called an estate in fee—during his own life, or the life or lives of another or others—or an estate to him and his heirs, so long as they shall continue to reside in such a place, or until any uncertain event happen—or an estate to him and some particular heirs, as the heirs of his body, or the heirs *male* or *female* of his body. But where the estate is limited to a certain duration, though it be a thousand years or more, it is not considered, in the law, *freehold*. These estates of freehold may arise, or be created, in a great variety of ways, in the different courses of descent, or modes of purchase, by act and operation of law, or by convention between the parties. An estate of freehold may exist, not only in *lands*, but in a great variety of *ideal* property, called *incorporeal hereditaments*, such as *rents*, *ways*, *commons*, *pensions*, and *annuities*, &c., &c. The word *family* has in law, no definite signification: the evident policy of the statute was to exempt from sudden arrest and imprisonment, one, upon whom a wife or children are dependent for support. *Cowen's Treatise, Part 1, 464.*

It will be seen by reference to subdivision 1, of section 16 (sec. 18) of the Revised Statutes, that against resident defendants, not freeholders nor inhabitants having families, the magistrate may issue a summons or a warrant. Where a warrant is applied for, proof by affidavit must be produced showing a cause of action for which a warrant may issue, and that the defendant is not a freeholder nor an inhabitant having a family. *See inhabitancy, residence and domicil, discussed, In the matter of John M. Wrigley, 8 Wend., 131; Brown v. Ashbough, 40 How., 260.*

Section 17 (sec. 19) of the Revised Statutes, requires that in all cases where a warrant is applied for, the person applying shall by affidavit state the facts and circumstances upon which he grounds his application. It makes one exception, however; where the action is commenced by summons, no affidavit is needed, the constable's return being sufficient. Of course, where the legislature, since the passage of the general statutes, has authorized a justice to issue warrants for specific acts in a specific manner, as, for instance, where a city charter provides that certain penalties may be recovered in a justice's court and that the first process in such action shall be by warrant, warrants may be issued without affidavits. *Walker v. Cruikshank*, 2 *Hill*, 296. This case arose under an ordinance of the city of Utica. The court in the opinion of justice Bronson, say: "Under the justice act a warrant cannot issue except upon very special circumstances, and to hold that the attorney must comply with that act, would, in many cases, amount to a denial of all remedy for a violation of the city ordinances. I see no reason why we should disregard the charter in settling this question." Still further reasons may be urged. Civil warrants cannot issue upon demands arising upon contracts, express or implied, except, where the suit is brought for the recovery of money collected by a public officer, or for official misconduct or neglect of duty, or for damages for misconduct or neglect in any professional employment. The Non-imprisonment Act (Law of 1831) requires that the affidavit should state the nature of the cause of action, so that the magistrate may see that the demand does not arise upon contract, or, if it does, that it comes within one of these exceptions. If then the charter authorizing the issuance of a warrant, requires the preliminary affidavit as under the Law of 1831, it precludes the possibility of such a process being issued. The affidavit must show that the cause of action was in the nature of a tort, or else a warrant cannot issue under that law unless within the exceptions, as before stated. Did the legislature intend that a warrant might issue for a violation of an ordinance according to the provisions of the Non-imprisonment Act, when, by that Act, it could not issue? Certainly not. It is difficult to conceive that the legislature meant anything else, than that a warrant might issue under the charter

without the formality of a preliminary affidavit. A different construction would lead to the absurdity that the legislature, by the charter, authorized the issuance of a warrant, when the laws of the State prohibited it, and this is not to be supposed. The manifest intent of the legislature was to give a summary and decisive remedy for a violation of the provisions of the charter. It is the duty of courts to construe the law so that its provisions may be effective—not abortive. The object of the legislature in making a statute should be carefully considered. Such intention may be deduced from the cause or necessity of making it, or from the mischiefs of an old law. *Hall v. Penney*, 11 *Wend.*, 44; *White v. Syracuse & Utica R. R. Co.*, 14 *Barb.*, 559.

The affidavit of the applicant should state *facts and circumstances*, that the justice may judge of the propriety of issuing the warrant. The mere belief of the applicant is not sufficient—it is not evidence. This rule, which is not difficult in its observance, although so many mistakes are made in such affidavits, must be carefully regarded. *Loder v. Phelps*, 13 *Wend.*, 46; *Pope v. Hart*, 35 *Barb.*, 630; *S. C.*, 23 *How.*, 215. The language of the statute, that the party must show to the *satisfaction of the justice*, &c., does not mean that the justice may issue a warrant whenever he chooses, but, when taken in connection with that clause of the statute which requires the *facts and circumstances to be stated*, means that the facts and circumstances must be stated in order that the justice may be satisfied of the propriety of issuing the warrant. *Money v. Tobias*, 12 *John.*, 422; *Stewart v. Brown*, 16 *Barb.*, 367. The latter case is one of attachment, but the principle there decided is applicable to warrants.

The affidavit should show *affirmatively*, the facts and circumstances which are necessary to authorize the issuance of the warrant; also the residence of the parties; and that the action is of that class for which a warrant will lie.

Where the defendant is a resident and the plaintiff a non-resident of the county, the cause of action for which a warrant may issue and the fact that the plaintiff is a non-resident must be shown. A warrant may issue in favor of a non-resident plaintiff against resident defendants, whether they are, or are not, inhabitants having families, or freeholders. In such a case, however,

security must be given, as subdivision 2, of section 15 (sec. 17), of the Revised Statutes provides.

Whenever it is desired to obtain a warrant in an action where the plaintiff is a resident and the defendant a non-resident, the affidavit must show the nature of the cause of action, and the residence of the parties.

Where the defendant is a freeholder, or an inhabitant having a family, the provisions of subdivision 4, of section 15 (sec. 17), of the Revised Statutes, must be observed.

Where both the parties are residents of the county, and the defendant is neither a freeholder nor an inhabitant having a family, such facts must be set forth in the affidavit, and in addition thereto, the cause of action must be shown to be one for which a warrant may issue.

If both the plaintiff and defendant are non-residents of the county, and a warrant can issue, the fact of non-residence should be set forth in the affidavit. In accordance with the statute, the plaintiff must give a bond, with surety, for the payment of any sum of money "which may be adjudged against him in the suit."

When the action is commenced by warrant in the name of two plaintiffs, an affidavit that one of the plaintiffs is a non-resident of the county is not sufficient to authorize the issuance of a warrant. In such case, the affidavit should show that both plaintiffs are non-residents. *Linnell v. Sutherland*, 11 Wend., 568.

Where the plaintiff and defendant are residents of the county, and the defendant is a freeholder, or an inhabitant having a family, the affidavit must show such facts, and the nature of the demand, and in addition, "that the defendant is about to depart from the county with intent not to return thereto," or, "that the plaintiff will be in danger of losing his debt or demand unless such warrant be granted." The statement, however, of either, or both, of these additional grounds, is not sufficient; it is also necessary to state the facts and circumstances showing the existence of such grounds.

If the name of the defendant is unknown, the plaintiff may use a fictitious one to designate him; but such want of knowledge must be set forth in the plaintiff's affidavit, and that the name used is not the real but the fictitious one, in addition to those other facts that the statute requires should be stated. On this

subject the statute provides: "Whenever the name of any defendant shall not be known to the plaintiff, he may be described in the summons or warrant by a fictitious name; and if a plea in abatement be interposed by such defendant, the justice before whom the suit is pending, shall amend the proceedings according to the truth of the matter, and shall thereafter proceed therein in like manner as if the defendant had been sued by his right name."

The following form may be used:

SARATOGA COUNTY, ss.:

Timothy Holmes being duly sworn, says, that he hereby applies for a civil warrant against a person who is herein named James Black, in favor of this deponent; that said name, James Black, is a fictitious name, and that the true name of such person is unknown to this deponent; that the cause of action for which said warrant is desired, is (*here state the cause of action, as, for example, for the wrongful taking, carrying away, and converting to his own use, by said James Black, on or about the first day of December, 1873, at the town of Saratoga Springs, in said county, one roan horse, of the value of one hundred and fifty dollars, which was and is the property of this deponent*); that said James Black is a non-resident of the county of Saratoga.

TIMOTHY HOLMES.

Sworn before me, this 13th day {
of December, 1873. }

LEWIS WOOD,

Justice of the Peace.

The following is a general form of affidavit for a warrant in cases *not arising on contract* :

SARATOGA COUNTY, ss. :

Timothy Holmes, being duly sworn, deposes and says, that he has, as he verily believes, a good cause of action against Ambrose Hillman, for *(here state the real cause of action, as for example, taking and carrying away, and converting to his own use, on or about the first day of December, 1873, at the town of Greenfield in said county, the goods and chattels of this deponent, to wit: one two-horse lumber wagon of the value of one hundred dollars)*, and this deponent makes application for process by warrant therefor, against the said Ambrose Hillman, and in favor of this deponent ; deponent further says, that the said Hillman is a non-resident of the county of Saratoga ; *or*, deponent further says that he, this deponent, is a non-resident of said county and is willing to give security for the payment of any sum which may be adjudged against him in this suit ; *or*, deponent (or any other witness) further says, that said Hillman is about to depart from said county with intent not to return thereto *(here state facts and circumstances showing such intent, as for example, that deponent heard said Hillman say yesterday that he was packing up his goods and as soon as he could, he intended to leave this county and never come back again)* ; *or*, deponent further says that said Hillman is an inhabitant of said county having a family (or, that said Hillman is a freeholder of said county) and that he will be in danger of losing his demand unless such warrant be granted. *(Here state the facts and circumstances on which that belief is founded, as for instance, that yesterday said Hillman in presence of this deponent offered to sell part of his property for half what it was worth, and said he had already sold some of it and intended when he had disposed of the remainder, to pocket the money and leave his creditors to whistle for their pay.)*

TIMOTHY HOLMES.

Sworn before me this 13th day {
of December, 1873.

J. S. B. SCOTT,
Justice of the Peace.

The following is a general form of affidavit for a warrant in cases *arising on contract*.

SARATOGA COUNTY, ss. :

James Minick, being duly sworn, says, that he has as he verily believes, a good cause of action against Ambrose Hillman, against whom he applies for process by warrant, in pursuance of the statute in such case made and provided. And this deponent further says, that the said cause of action is on contract (*or, on judgment, and if so, such judgment must be particularly described*) for money collected by the said Ambrose Hillman in his official character as (*for instance*) constable; *or*, 2. That the said cause of action is for the official misconduct (or neglect of duty) of the said Ambrose Hillman as (*for instance*) police justice; *or*, 3. That the said cause of action is for damages arising from the misconduct or neglect of the said Ambrose Hillman in his professional employment as (*for instance*) attorney. (*Here set forth the facts and circumstances of the case and the residence of the parties.*)

JAMES MINICK.

Sworn before me this 13th day }
of December, 1873. }

J. S. B. SCOTT,
Justice of the Peace.

The affidavit should not be entitled. *See entitling of affidavit, under attachment.*

The following form of bond may be used by a non-resident plaintiff:

Know all men by these presents, that we, Runnion M. Patrick and Wm. M. Searing, Jr., are held and firmly bound unto Ambrose Hillman in the sum of two hundred dollars, to be paid to the said Hillman or to his certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally,

firmly by these presents. Sealed with our seals. Dated the 13th day of December, 1873.

Application having been made to P. F. Allen, Esq., one of the justices of the peace of the town of Saratoga Springs, in the county of Saratoga, by Timothy Holmes, a non-resident of said county, for a civil warrant in his favor against Ambrose Hillman; and such application having been made in an action not arising on contract (*or, in an action arising on contract under the exceptions mentioned in the statute*);

Now, therefore, the condition of this obligation is such, that if the said Timothy Holmes, shall pay to the said Ambrose Hillman any sum which may be adjudged against the said Timothy Holmes in said suit, which is commenced by said warrant, then this obligation to be void, otherwise to be of full force and virtue.

RUNNION M. PATRICK. [L. S.]

WM. M. SEARING, JR. [L. S.]

Sealed and delivered }
in presence of }

CHAS. H. TEFFT, JR.

I hereby approve of Runnion M. Patrick and Wm. M. Searing, Jr., as sureties in the within bond.

P. F. ALLEN,

Justice of the Peace.

December, 13th, 1873.

Although the statute is silent on the subject, it is well for the justice to approve the bond or have the same acknowledged before him.

It will be seen by reference to the statutes, that the justice, when he orders the detention of a canal-boat by warrant, must take a bond, and so must security be taken when he issues a warrant in case of a non-resident plaintiff; in no other cases does the statute require security. In the case of a non-resident plaintiff, the bondsmen are liable for any sum which may be adjudged against them in the suit. The sureties in a bond for a non-resident plaintiff, are not liable for the costs on *certiorari* to the court below, because it is the com-

mencement of a *new suit*. But they are held to be liable for costs in cases of appeal to the county court. *Fenno v. Dickinson*, 4 *Denio*, 84; *Travers v. Nichols*, 7 *Wend.*, 434; *The People ex rel. Tomb v. The Judges of the Common Pleas of Washington County*, 1 *Cow.*, 576; *Ex parte Thomas*, 8 *Cow.*, 110; *Bennett v. Rathbun*, 17 *John.*, 37; *Volk v. Youngs*, 1 *Cow.*, 425. These cases hold, that actions commenced in a justice's court and carried to the county court are *continuations of the same suit*. It follows then, that sureties are liable for the increased costs.

The non-resident plaintiff must give security; but the kind of security, or the amount, the statute does not state. It may be either a sum of money or a bond, notwithstanding that in the case of *Money v. Tobias*, 12 *John.*, 442, it was decided that a verbal promise to answer as surety is void by the statute of frauds, for, following this case, is that of *Wheelock v. Brinkerhoof*, 13 *John.*, 481, which decides that a deposit of money will be sufficient as a mode of giving security. If a sum of money be taken as security, the amount should be sufficient to cover the sum which may be adjudged against the plaintiff in the suit; and the justice must be careful that the amount be sufficient to meet the *full* sum which can *possibly* be recovered of the plaintiff by the defendant. It being impossible to estimate, with any degree of accuracy, the sum which may ultimately be adjudged against the plaintiff, it would be extremely hazardous to rely upon a deposit of money as security. The better and safer way is for the justice to take a bond; and to relieve himself from responsibility he should have the surety or sureties justify in a sum which beyond all reasonable doubt will cover costs on appeal.

Following the provisions of the statute, the form of the warrant may be as follows:

SARATOGA COUNTY, ss.:

The People of the State of New York, to any constable of said county, Greeting:

We command you to take Ambrose Hillman and bring him forthwith before Lewis Wood, Esq., one of the justices of the peace of the town of Saratoga Springs, in said county, at his office

No. 7, Town Hall, in said town and county, to answer Timothy Holmes in a plea or action for (*here state the cause of action, as for instance, for taking, and carrying away, and converting to his own use, one two horse lumber wagon*), to the damage of the said Timothy Holmes of two hundred dollars or under; and after you shall have arrested the said defendant do you notify the said plaintiff thereof. And have you then and there this precept. Hereof fail not at your peril. Witness, our said justice, at the town of Saratoga Springs, in said county, the 13th day of December, 1873.

LEWIS WOOD,
Justice of the Peace.

This process may be under, or without, seal.

There should be a statement in the warrant of both the christian name and surname of the plaintiff. The law recognizes but one christain name, so that an error in a middle name may be struck out as surplusage. *Van Voorhis v. Budd*, 39 Barb., 479. If the action is commenced by partners or others jointly interested, the names of each must be written separately, and in case of partnership, in addition thereto the firm name, with the statement that they compose such firm and do business under such firm name; for instance: "Thomas Bently, Allen Potter, and John P. Becker, trading under the style and firm of Thomas Bently, Allen Potter and John P. Becker & Co. *Bently v. Smith*, 3 Caines, 170. Actions brought by and against public officers, must be brought not by or against the office, but by or against the person holding it, by his name, adding his official designation. *Agent of State Prison v. Rikeman*, 1 Denio, 279; *Supervisor of Galway v. Simpson*, 4 Hill, 136; *Commissioners of Cortlandville v. Peck*, 5 id., 215. Where an infant brings an action by guardian, the names of both should appear—the one as infant and the other as guardian.

It is not necessary under the statute, to state the amount of the plaintiff's claim, but if this is done, the sum named must not be over two hundred dollars, so that it may be within the jurisdiction of the court.

Subdivisions 3 and 4, of section 15 (sec. 17) of the Revised Statutes, read, "When it shall appear to the satisfaction of the justice, by the affidavit of the *applicant or of any other witness*, that the person against whom such warrant is desired, &c., &c.," and, "Where the defendant is an inhabitant of the county having a family or a freeholder of the same county, and it shall in *like manner appear* to the satisfaction of the justice, &c., &c.;" and section 17 (sec. 19) reads, "In all cases on application for a warrant, except where the suit shall have been commenced by summons, the *person applying* shall by affidavit state the facts and circumstances," &c., &c. From this reading, we see that it was undoubtedly the design of the statute to allow any person who knew the facts necessary to obtain a warrant, to be sworn on such application. This would seem to be the true meaning of the law.

If an affidavit is defective, in that it does not give the justice jurisdiction, all who act under it will be trespassers; care, therefore, should be taken to show such facts as will give the magistrate jurisdiction of the person and the subject-matter, for after the arrest of the defendant the affidavit cannot be amended. *Loder v. Phelps*, 13 *Wend.*, 46.

It is the duty of the justice, as soon as he is satisfied that the affidavit upon which the warrant has been issued is insufficient to sustain the proceeding, to immediately discharge the defendant from custody. *Shannon v. Comstock*, 21 *Wend.*, 459.

The justice may have jurisdiction of the case, and yet should, under a certain state of facts, quash the warrant. The judge says in the case last cited, "The justice had jurisdiction of the process, and the affidavit on which the warrant issued made it regular in the first instance. But certainly the affidavit was not conclusive. It was still open to be met by the defendants on proof that it was made under a plain mistake. That was admitted, and the justice should therefore have dismissed the suit."

The application of the party for a warrant may be verbal. The statute says: "In all cases on application for a warrant, except," &c.,—"the person applying shall by affidavit state the facts and circumstances within his knowledge showing the grounds of his application," &c. Yet it is the usual practice to include in the affidavit of proofs presented, a request for the warrant. Neither

is it required by statute that the plaintiff should be present at the time the application is made. All the law requires is that the grounds of the application shall be shown by affidavit, whereby the justice may the better judge of the necessity and propriety of issuing such warrant. It has been decided that the agent of the plaintiff may make the application and affidavit. *Hunter v. Burtis*, 10 *Wend.*, 358.

“Where a warrant issues in favor of a non-resident plaintiff, the action may be brought before any justice of the county, and need not be brought before a justice of the town where the defendant resides, or of the next adjoining town.”

“In a suit against a *non-resident defendant*, the action by warrant must be brought before a justice of the town in which the defendant may be at the time of the commencement of the suit; but it is not necessary that a *non-resident plaintiff* should be personally in the county at the time of the application for process.” *Hunter v. Burtis*, 10 *Wend.*, 358; *Onderdonk v. Rawlett*, 3 *Hill*, 323.

By reference to the statutes in relation to actions brought to recover any penalty for the taking of property from the banks or vicinity of any canal in this State, it will be seen that an affidavit must be made stating such facts as will bring the action within the provisions of the statute. The statements alleged in the affidavit must be positive and unambiguous, and in every particular meet the requirements of the statute. The affidavit must show that the property mentioned in the statute, or some part thereof, was wrongfully taken and carried away from the banks or vicinity of a canal (specifying the name), by some boatman or other person on board of some float or boat (specifying its name) on such canal and on which said person was employed, also the time when, and the place where, the act was committed, and the value of the property so taken and carried away.

Section 293 (sec. 172) provides, that whenever a suit is prosecuted for any penalty or forfeiture under this statute, the magistrate issuing the process, may, by a clause inserted therein, detain any canal boat or float, and the furniture and horses belonging thereto, until the suit shall be determined or until adequate security be given for the payment of any judgment that may be recovered

against the defendant; section 294 (sec. 173) provides, that if such security be given or the defendant in such suit shall prevail, the magistrate shall order the boat or float or property detained, to be released; but if no such security be given and a judgment be recovered for such penalty or forfeiture together with costs, and if such judgment shall not be immediately paid, execution may issue, under which the property detained may be sold. But by section 21 (sec. 23), it is provided, that the justice shall not indorse such order of detention on the warrant, unless a bond as prescribed in the next section shall be executed and delivered to the justice. That section provides, that such bond shall be in the penalty of at least one hundred dollars, with one or more sureties to be approved by such justice, conditioned, that such action shall be prosecuted to judgment with all convenient speed, and that if judgment be rendered in favor of the defendant, the obligors shall pay the costs and charges which shall be adjudged against the plaintiff and all damages which may ensue from the detention of such boat and the cargo thereof and the crew navigating the same.

The practice in relation to the bond, under these different sections, is somewhat analogous to that pursued in actions of replevin in justices' courts. If the plaintiff desires the boat, float, horses or furniture detained, he must give a bond in the penalty of at least one hundred dollars, approved by the justice, conditioned as in said section 22 (sec. 24) prescribed. After this preliminary bond is given, the justice should insert in the warrant a direction to the constable to detain such boat or float, &c., until his further order. The officer should then arrest the defendant, and detain the canal boat, &c., under his care and supervision. If the owner or master desires to regain possession of the boat, &c., he may go before the magistrate with his sureties and give the security prescribed by the statute. The boat and the other property should then be surrendered.

Sections 343 and 344 of the Revised Statutes, 5th edition, 638, provide as follows, for the issuance of warrants against agents, &c., employed on any canal:

"It shall be the duty of every agent, toll-collector, lock-keeper or superintendent, employed on any canal, and occupying any house, office, building or land, belonging thereto, who shall be dis-

charged from his employment; and of the wife and family, of every such person, who shall die in such employment, to deliver up the possession of the premises so occupied, and of all books, papers, matters or things belonging to the canals, acquired by virtue of his office, within seven days after a notice shall have been served for that purpose, by the acting canal commissioner.

“In case of a refusal or neglect to make such delivery, in either of the above cases, it shall be the duty of any justice of the peace, in the county where such premises shall be situate, upon application, to issue his warrant, under his hand and seal, ordering any constable, or other peace officer, with such assistance as may be necessary, to enter upon the premises so occupied, in the day-time, and remove therefrom all persons found in possession thereof, and to take into his custody all books, papers, matters and things there found, belonging to the canals, and to deliver the same to the acting canal commissioner, or his authorized agent; and the officer to whom such warrant shall be delivered, shall execute the same according to its purport.”

A civil warrant is executed by taking the defendant into custody and bringing him personally before a justice. “An arrest is the depriving a person of his liberty by legal authority.” An actual or a forcible seizure of the defendant’s body, however, is not necessary; it is sufficient that the officer tell the defendant that he has a warrant for his arrest, and that the defendant submit to his authority—“but mere words without submission are not sufficient.” 2 *Hale, Pl. Cr.*, 129; *Van Voorhes v. Leonard*, 1 *N. Y. Supreme Ct. Rep.*, 148. If the defendant resist the execution of the process, the officer has a right to use force to compel submission, being careful, however, to use no more than is necessary to execute the mandate of his warrant. *Gold v. Bissell*, 1 *Wend.*, 210. He has also a right to command the assistance of third parties, according to his discretion; and every person thus commanded, who refuses to obey, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment. 3 *Revised Statutes*, 5th ed., 740. The arrest may not be made by the hand of the officer—in fact, he may not be present at the time of its accomplishment, but he fills the measure of his duty as prescribed by law, if he be *bona fide* engaged in the business, though another

by his direction make the actual arrest, and he will be deemed *constructively* present. *Coyles v. Hurtin*, 10 *John.*, 84.

The warrant should be directed to any constable of the county, but the justice may depute some person of lawful age and not a party interested in the suit, to serve the process. Such deputation should be indorsed on the warrant and may be in the following form :

SARATOGA COUNTY, }
TOWN OF SARATOGA SPRINGS, } ss. :

Judging it expedient, I hereby, at the request of the within named plaintiff, depute John Welsh to execute the within warrant, he being of lawful age and not a party in interest in the action.

LEWIS WOOD,

Justice of the Peace.

December 13th, 1873.

As the statute prohibits the deputation of parties in interest, it would be an irregularity for the justice to empower the plaintiff in the action to serve the warrant; and the opinion seems to be that a constable would not be authorized in serving a warrant in his own favor. *Cowen's Treatise, Part I*, 514; *Bennet v. Fuller*, 4 *John.*, 486; *Tuttle v. Hunt*, 2 *Cowen*, 436; *Putnam v. Man*, 3 *Wend.*, 202. The justice should be careful to direct the warrant according to the provisions of the statute, and the officer, to see that he is empowered by such warrant to serve it.

Section 159 of the Revised Statutes, 5th edition, volume 3d, page 454, provides as follows, relative to the filling up of certain process : "Every summons, warrant, attachment and execution issued by a justice of the peace shall be entirely filled up, and shall have no blank either in the date or otherwise, at the time of its delivery to an officer to be executed. Every such process, which shall be issued and delivered to an officer, to be executed, contrary to the foregoing provision, shall be void." For a violation of this provision the justice shall be deemed guilty of a misdemeanor, and, on conviction, shall be subject to fine or imprisonment, or both, in

the discretion of the court, and such conviction operates as a forfeiture of his office. *Id.*, § 162.

When a statute requires that a particular officer or class of officers shall execute process, and it is executed by another, such a proceeding is void. It gives no jurisdiction; and all the subsequent proceedings upon it are *coram non judice* and void. *Reynolds v. Orvis*, 7 Cow., 267; *Merritt v. Reed*, 5 Denio, 352.

A civil, like a criminal, warrant, has no stated return day; the constable must bring the defendant before the magistrate forthwith. The officer is allowed reasonable time in which to secure the defendant, and what "reasonable time" is, must depend upon the circumstances of the case. If the constable has reason to believe that the defendant is in an adjoining town or in a remote part of the county, it is his duty to follow and arrest him. The officer is bound to use all possible dispatch in executing the mandate in the warrant. In the case of *Arnold v. Steeves*, 10 Wend., 514, where the defendant was arrested on a civil warrant and taken before two justices successively, who each refused to try the action, and where the defendant then left the county and did not return for three or four weeks, it was held that the process was not spent, and that the right of the constable to retake and arrest him anew, had not ceased.

A regular officer is not bound to show his authority or process when he arrests a defendant; a special deputy is (*Arnold v. Steeves*, 10 Wend., 516); and if he refuse, the courts will justify the resistance to such arrest, and the warrant will be no protection against an action for an assault and battery and false imprisonment. *Frost v. Thomas*, 24 Wend., 418. Not so, however, where the process is served by a regular officer. "But," as Justice Bronson says in the case of *Bellows v. Shannon*, 2 Hill, 86, "all the books agree that the officer is bound to give the substance of the warrant or process, to the end that the party may know for what cause he is arrested and take the legal measures to discharge himself. This is, however, where the party submits to the arrest, and not where he makes resistance before the officer has time to give the information. Although the officer is not bound to exhibit the warrant, especially where there may be reason to apprehend that it will be lost or destroyed, yet, I cannot doubt that it is his duty

to inform the party, where such is the fact, that he has a warrant, or to make known in some other way that he comes in his character as an officer to execute legal process, and not leave the party to suppose that he is assailed by a wrong-doer. The contrary doctrine would be likely to lead to violence and bloodshed. I do not say that the officer is bound to declare the particulars of his authority before he makes the arrest, or that it may not sometimes be proper to lay hands on the party before a word is spoken; but either before or at the moment of the arrest, the officer ought to say enough to show the party that he is not dealing with a trespasser but with a minister of justice."

It has been decided by the Supreme Court, that a civil warrant being *mesne* process, the defendant after a voluntary escape may be retaken on the same warrant. *Arnold v. Steeves*, 10 *Wend.*, 514; *Allen v. Martin*, 10 *Wend.*, 300.

The following form of return to the warrant may be used :

SARATOGA COUNTY, ss. :

I hereby certify and return : that I arrested the within named defendant at the town of Stillwater, county of Saratoga, on the 13th day of December, 1873, and he is at this time, 2.20 o'clock, p. m., before the court; plaintiff notified; *or*, that after due diligence and search, the within named defendant cannot be found within said county.

JASPER SMITH,
Constable.

December 13th, 1873.

As the territorial jurisdiction of the justice is confined to the limits of the county in which he is elected, it follows, that process issued by him cannot be executed out of the county where it is returnable, unless specially directed by the statute, which, in this instance, is not the case. The jurisdiction of an inferior court is confined strictly to the authority accorded it by statute; it is never presumed; the statute must give it affirmatively. *Bloom v. Burdick*, 1 *Hill*, 130.

By statute, no writ, process, warrant, order, judgment, decree or other proceeding, of any court or officer of justice, shall be served or executed upon the first day of the week called Sunday. 2 *R. S.*, 5th ed., 935. This was the common law, incorporated therein from a canon of the church in the year A. D. 517. Anciently, courts of justice sat on Sunday. The reason assigned for this by Sir Henry Spelman, is, that "the Christians at first, used all days alike for hearing of causes, not sparing, as it seemeth, Sunday itself, for two reasons: one was to be in opposition to the Jews and Heathen, who were superstitious about observing days and times, conceiving some to be ominous and unlucky and others to be fortunate; and, therefore, it is said that the early Christians were more remiss in the observance of Sunday than is commonly supposed. A second reason probably was, that by keeping their own courts always open, they prevented Christian suitors from resorting to Heathen courts of judicature." The canon of 517, was ratified by Theodosius, in a decree as follows: "That on the Lord's Day (which the elders rightly call Sunday) it was his wish that all law-suits and business should entirely cease." There were several canons of the church passed on this subject which not only precluded the bishops from holding courts on Sunday, but also the earls and judges. These canons were received and adopted by the Saxon kings, and were all confirmed by William the Conqueror and Henry the Second, and so became part of the common law of England. The Constitution having adopted the common law of England as a rule of action for our courts, these canons are in full force in this country. The law has been somewhat extended and the rule enlarged by our statutes. Our laws now prohibit the issuance or service of process on Sunday. Such day is considered *dies non juridicus*. *Van Vechten v. Paddock*, 12 *John.*, 178; *Rob v. Moffat*, 3 *John.*, 257; *Buller v. Kelsey*, 15 *John.*, 177; *Story v. Elliot*, 8 *Cow.*, 27; *Pulling v. The People*, 8 *Barb.*, 384.

By the method of computing time in this State, established by the Revised Statutes, a day consists of twenty-four hours, and commences and ends at midnight. Whenever, therefore, a statute forbids an act to be done on a particular day, it has reference to this mode of computation by the calendar; unless there is some

express declaration to the contrary. *Pulling v. The People*, 8 Barb., 384.

No civil process shall be served upon any person on Saturday where such service is prohibited by statute, nor can such process be made returnable on such day in such case. *Maxon v. Annas*, 1 Denio, 204; 2 R. S., 5th ed., 936. Nor can any civil process, nor any proceeding in the nature of civil process, be served upon any elector entitled to vote therein in any city or town, on an election day or on town meeting day. 1 R. S., 5th ed., 418; 1 R. S., 5th ed., 819; *Meeks v. Nowon*, 1 Abb., 280; *Bierce v. Smith*, 2 Abb., 418.

After a negligent escape, an officer may retake the defendant even upon Sunday; the doing so is no service of process, but is only a continuance of the former imprisonment. *Nicoles v. Ingersoll*, 7 John., 145. *Opinion of Justice Thompson*, 155, 156.

Section 74, volume 3, of the Revised Statutes, 5th edition, page 480, makes provision as follows: "All officers of the several courts of record shall be liable to arrest on any process against the body, and may be held to bail in the same manner as other persons, except during the actual sitting of any court of which they are officers; and when sued with any other person, such officers shall be liable to arrest and may be held to bail as other persons, during the sitting of the court of which they are officers; but no attorney or counselor or solicitor shall be exempt from arrest during the sitting of the court of which he is an officer, unless he shall be employed in some cause pending and then to be heard in such court."

If an attorney or counselor be taken on *ca. sa.* during his attendance in court, having business there, he may be discharged on motion. A judge at circuit may also discharge him under like circumstances. *Secor v. Bell*, 18 John., 52. A counselor of the Supreme Court is privileged from arrest during the sitting of the court, though not in actual attendance at term. *Sperry ads. Willard*, 1 Wend., 32. Where a counselor of the Supreme Court was actually attending term for the purpose of making a non-enumarated motion, and where it was shown that his personal attendance was deemed necessary to the interest of his client, it was held that he was privileged from arrest. *Humphrey v. Cumming*, 5 Wend., 90. The privilege of the officers of inferior courts, *i. e.*, attorneys

of the Court of Common Pleas, from arrest by process from the Supreme Court, has never been extended beyond the time of their necessary attendance on those courts. They have no exclusive perpetual privilege as against the jurisdiction of the Supreme Court. *Gibbs v. Loomis*, 10 *John.*, 462. Attorneys and counselors of the Supreme Court are privileged from arrest while in actual attendance upon the court, or while going to, or returning from, court, but while remaining at home they are subject to arrest. *Corey v. Russell*, 4 *Wend.*, 204. An attorney or other officer of the court, is never privileged from arrest when sued with another, although during the actual sitting of court, and during his attendance thereon. *Gay v. Rogers & Wait*, 3 *Cow.*, 368; *Tiffany v. Driggs*, 13 *John.*, 252. If sued, however, with a privileged person, he does not lose his privilege. *Grah. Prac.*, 2d ed., 38. An attorney or counselor of any court of record is exempt from the service of process issued out of a justice's court, during the sitting of the court of which he is an attorney or counselor. *Gilbert v. Vanderpoel*, 15 *John.*, 242. If an attorney ceases to practice for a year, not in consequence of any temporary absence or vocation, but betaking himself to a profession or business incompatible with his practice as an attorney, his privilege ceases. Attendance, for the protection of suitors, is the ground of the privilege. *Brooks v. Patterson*, 2 *John. Cases*, 102. A counselor of the Supreme Court is not privileged from arrest, while attending before an examiner, master or judge, *out of court*. *Cole v. McClellan*, 4 *Hill*, 59.

A party attending a reference is entitled to privilege from arrest; but it extends only to a reasonable time after the hearing. Where a party attended a reference and after the hearing waited two days for report of referees, and thereafter, while engaged with his counsel in preparing the necessary papers to set the same aside, was arrested on a *capias* at the suit of the plaintiff who was defendant in the cause which had been submitted to reference; held, that a party attending a reference is entitled to privilege, the same as when attending a trial; but it lasts only during the hearing and a reasonable time after to enable the party to return to his residence. A party may remain, to learn the verdict of a jury who cannot separate until verdict is pronounced. The party being engaged in preparing to set aside the report, gives him no claim to be exempted from arrest.

Clark v. Grant, 2 *Wend.*, 257. This privilege from arrest "extends to a party to an action which has been referred to the decision of the court, upon a case stated, while going to, attending, or returning from, court; or while attending an appeal from another county to the Supreme Court; or while attending before an arbitrator under a rule of the court; or before inferior courts; or for the purpose of opposing an insolvent's discharge; or under a recognizance to attend the Court of General Sessions; or before arbitrators under the statute; or before referees, although in the latter case it extends only to the hearing and a reasonable time after, to enable the party to return to his residence, and does not embrace the time in which the party is occupied in preparing papers to move to set aside the report." *Cowen's Treatise, Part 1*, 511.

This privilege also extends to witnesses, jurors, &c., in going to, attending upon, and returning from court; bail attending court to justify, and all other persons having any relation to a cause which calls for their attendance at court, whether their presence be compulsory or not, to the same extent—going, remaining, and returning. And upon the same principle, a next friend or guardian, admitted to prosecute or defend for an infant, when going, returning, &c., is privileged from arrest. *Id.* The statute privileging witnesses from arrest, reads as follows: "every person duly and in good faith subpœnaed as a witness to attend any court, officer or commissioner in any case where the attendance of such witness may be enforced by attachment, or by commitment, shall be exonerated from arrest in any civil suit, while going to the place where he shall be required by such subpœna to attend, while attending such place, and while returning therefrom." 3 *R. S.*, 5th ed., 685, § 65.

Since the passage of this statute, a witness, to claim privilege from arrest, must have been subpœnaed, for otherwise, "the attendance of such witness could not be enforced by attachment or commitment." *Coles v. McClellan*, 4 *Hill*, 60, and see note A of that case by *Reporter*; *Hardenbrook's Case*, 8 *Abb.*, 416.

Certain employees upon the canals in this State are privileged from arrest by civil warrant. The statute is as follows: "No acting commissioner, superintendent of repairs, collector or lock-keeper, on any canal, shall be held to bail, or taken by warrant in any civil

suit for any act done, or omitted to be done, by him, in the exercise of his official duties." 1 *R. S.*, 588, 5th ed., § 61.

The Revised Statutes provide that "no female shall be arrested or imprisoned upon any execution issued from a justice's court" (3 *R. S.*, 5th ed., 449, § 142), and the last clause of § 179 of the Code provides that "no female shall be arrested in any action except for a willful injury to person, character or property." This clause has been held to privilege a female defendant from arrest in an action for debt, although she may have fraudulently contracted said debt. *Wheeler v. Hartwell*, 4 *Bosw.*, 684. This privilege from arrest extends to *all females*, in actions founded on contract, and to *a married woman* whether the action be for a tort or on contract; and this although she be sued with her husband, or they live apart under articles of separation, and he allow her a separate maintenance; or although he reside constantly abroad. *Cowen's Treatise*, Part 1, 510. The general language of the Code, permitting the arrest of a female for "a willful injury to person, character or property" (§ 178), has not altered the rule of the common law, which privileges a married woman from arrest in all cases whatever. *Anonymous*, 1 *Duer*, 613; *S. C.*, 8 *How.*, 134. Section 178 of the Code, provides as follows: "No person shall be arrested in a civil action except as prescribed by this act; but this provision shall not affect the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April, 26, 1831, or any act amending the same, nor shall it apply to proceedings for contempts."

The statutes privileging the militia from the service of civil process are as follows:

"No person belonging to the military forces shall be arrested on any civil process, while going to, remaining at, or returning from, any place, at which he may be required to attend, for elections of officers or other military duty." *Revised Statutes*, 5th ed., Vol. 1, p. 771, § 22.

"For the purpose of preserving order on the day of parade, the militia shall be considered as under arms from the rising of the sun, to its setting on the same day; and shall be exempted from arrest on civil process, during that time." *Revised Statutes*, 5th ed., Vol. 1, p. 742, § 38.

"No person belonging to the military forces shall be arrested on

any civil process while going to, remaining at, or returning from, any place at which he may be required to attend for military duty." *Laws of 1870, Chap. 80, § 257.*

The statute under which members of the legislature are privileged from arrest, provides as follows :

"Every member of the legislature shall be privileged from arrest on civil process during his attendance at the session of the house to which he shall belong, except on process issued on any suit brought against him for any forfeiture, misdemeanor, or breach of trust, in any office or place of public trust held by him.

"Each member shall enjoy the like privilege for the space of fourteen days previous to any such session, and also while going to, and returning from, any such session, provided the time of such going and returning do not exceed fourteen days.

"Each member shall enjoy the like privilege after any adjournment of the legislature until its next meeting, when such adjournment shall not exceed fourteen days.

"Each member shall enjoy the like privilege while absent with leave of the house to which he shall belong." 1 *R. S.*, 5th ed., 455, §§ 6, 7, 8, 9.

A member of the legislature is not privileged after he has, in fact, reached home, although the fourteen days have not expired. *Colvin v. Morgan*, 1 *John. Cases*, 415; *Corey v. Russell*, 4 *Wend.*, 204.

The statute also privileges officers of the legislature, as follows: "No officer of either house, while in actual attendance upon the house shall be liable to arrest on civil process." 1 *R. S.*, 5th ed., 445, § 10.

Senators and representatives in congress, are, in all cases, except for the crimes of treason, felony and breach of the peace, privileged from arrest during their attendance at the session of their respective houses, and in going to, or returning from, the same. *Constitution of the United States*, Art. 1, § 6. The privilege of members of congress, under the constitution of the United States (Art. 1, § 6), is to be construed strictly, and allowed only during their attendance on their respective houses or while actually on their journey going to, or returning from, the seat of government. *Lewis v. Elmendorf*, 2 *John. Cases*, 222.

Immunity from arrest is a personal privilege which can be waived; and the waiver is complete if the person fail to claim it at once, or by any act show that he does not intend to make such claim. It must be pleaded before answering upon the merits or it will be deemed waived. *Randall v. Crandall*, 6 Hill, 342, note 553; *Petrie v. Fitzgerald*, 1 Daly, 401.

Foreign ministers are also privileged from arrest, and their goods or chattels are not subject to distress, seizure or attachment. *Brightley's Digest of Laws of U. S.*, Title, "*Ambassadors and Public Ministers*." The section of the law on this subject is as follows: "If any writ or process shall at any time hereafter be sued forth or prosecuted by any person or persons in any of the courts of the United States or in any of the courts of a particular State, or by any judge or justice therein respectively, whereby the person of any ambassador or other public minister of any foreign prince or State, authorized and received as such by the President of the United States, or any domestic or domestic servant of any such ambassador or public minister, may be arrested or imprisoned or his or their goods or chattels be distrained, seized or attached, such writ or process shall be deemed and adjudged to be utterly null and void, to all intents, construction and purposes, whatsoever." The privilege of an attaché to a foreign legation is embraced within this act (*U. S. v. Benner*, Bald., 234); so is that of a secretary of legation. *Ex parte Cabrera*, 1 W. C. C., 232; *Taylor v. Best*, 25 Eng. L. and Eq., 383. The privilege of a minister continues after his functions have ceased and he has received his passports (*D'Azavedo v. Pareira*, 1 Miles, 366); so does that of a chargé d'affaires whose official duties have ceased on the arrival of the minister of his government. *Dupont v. Pichore*, 4 Dall., 321. The minister of a foreign State is privileged while traveling through the territories of a State to which he is not accredited. All the reasons which establish the independence and inviolability of the person of a minister, apply likewise to secure the immunities of his house. The *comites* of a minister and of his train, partake of his inviolability. *Respublicas v. De Longchamps*, 1 Dall., 17. The recognition by the president, of a foreign minister, is conclusive upon the judiciary. *U. S. v. Ortega*, 4 W. C. C., 531; *U. S. v. Benner*, Bald., 234. A foreign consul is not privileged

from suit as is a public minister, but he is suable only in the federal courts. *U. S. v. Ravara*, 2 *Dall.*, 299; *Commonwealth v. Kosloff*, 5 *S. & R.* 545.

The privileges of foreign ministers, have their origin and support in the law of nations. The act of congress was not necessary, nor intended, to confer privileges, neither does it limit their extent; its object was to enforce these privileges and punish all violations of them. *Holbrook v. Henderson*, 4 *Sandf. Sup. Ct. N. Y.*, 619.

This law of privilege, is as obligatory on the State courts as upon those of the United States; and it is the duty of both to quash proceedings against any one having such privileges. But the Circuit Court cannot quash proceedings against a public minister depending in a State court; nor can it in any way interfere with the jurisdiction of the courts of a State. *Ex parte Cabrera*, 1 *W. C. C.*, 232.

Any person who executes process on the person of a public minister, is to be deemed an officer within the meaning of the law. *U. S. v. Benner*, *Bald.*, 234.

An officer has no right to break open the outer door of a man's dwelling-house for the purpose of serving civil process, without license. The maxim of law is, "every man's house is his castle," and within it he can claim the privilege from arrest on civil process for himself, his family, and all who make it their permanent home. A breaking open does not necessarily imply a forcing of bolts or locks—even the lifting of the latch and entering, may be a breaking. "This principle was carried so far in one case, that where a deputy sheriff knocked at the door of one Parkes, whose wife came and opened the door to see who was there, and the deputy and those with him pressed in with violence and arrested a man who lodged in the house, it was held that the first entry was unlawful, the opening of the door being occasioned by craft." *Cowen's Treatise*, Part 1st, p. 512. But having once entered the house peaceably, an officer may break open inner doors to make an arrest. *People v. Hubbard*, 24 *Wend.*, 369; *Curtis v. Hubbard*, 4 *Hill*, 437; *Williams v. Spencer*, 5 *John.*, 351; *Glover v. Whittenhall*, 6 *Hill*, 597.

A steady boarder or lodger who has a room by himself, cannot claim protection from the service of civil process by shutting him-

self within that room if the officer has made a regular entry through the outer door, and neither is a previous demand of entrance to such room necessary. *Haggerty v. Wilber*, 16 *John.*, 287. The outer door, however, affords such boarder or lodger the same protection that it does the master of the house and his family. Even the owner of the house, if he has let it reserving a room for himself, cannot within that room set the officer at defiance; but, when the entry at the outer door has been legal, he may lawfully break such room door, and this, without a previous demand of entry. *Williams v. Spencer*, 5 *John.*, 351.

A man's house being a protection only for himself, his family, permanent boarders and lodgers, an officer may break an outer door to arrest a stranger who flies to it for refuge, after requesting admission and receiving a denial. But if the officer break even an inner door, to search for a stranger, on bare suspicion of his being there, and the event show that he was not there, such officer commits a trespass.

When an arrest has once been made and the defendant escapes without the consent of the officer, he has a right to break open the outer door of the defendant's dwelling-house to make a recapture; and a demand for entrance need not be made when the pursuit is fresh and the party consequently aware of the object of the officer. *Allen v. Martin*, 10 *Wend.*, 300.

The privilege which the law allows to a man's habitation and which precludes the entrance of the sheriff to arrest the party unless the outer door be open, does not extend to a store or barn disconnected from the dwelling-house and forming no part of the *curtilage*. *Haggerty v. Wilber*, 16 *John.*, 287. A *curtilage* is defined to be the inclosed space immediately surrounding a dwelling-house, contained within the same inclosure.

In a discussion of the principles here laid down, in the case of *Oystead v. Shed*, 13 *Mass.*, page 523, Chief Justice Parker says: "The very learned judges, *Foster*, *Hale*, and *Coke*, in treating of the inviolability of dwelling-houses, say that the outer doors or windows shall not be forced by an officer, in the execution of civil process against the occupier or any of his family who have their domicil or ordinary residence there: but that the house shall not be made a sanctuary for other persons; so that, if a stranger, whose

ordinary residence is elsewhere, upon a pursuit, take refuge in the house of another, the house is not *his* castle; and the officer may break open the doors or windows in order to execute his process; and if one, upon escape after an arrest, flee into his own house, it shall not protect him, &c. According to these principles, not only the children and domestic servants of the occupier are of his family, and so entitled to protection; but also permanent boarders, or those who have made the house their home, may properly be considered as a part of the family.

“The purpose of the law is, to preserve the repose and tranquillity of families within the dwelling-house: and these would be as much disturbed by a forcible entry to arrest a boarder or a servant, who had acquired, by contract, express or implied, a right to enter the house at all times and to remain in it as long as they please, as if the object were to arrest the master of the house or his children. A stranger, or perhaps a visitor, would not enjoy the same protection: for as they have acquired no right to remain in the house, if the occupant should refuse admission to the officer after his purpose and his authority were made known, the law would consider him as conspiring with the party pursued, to screen him from arrest, and would not allow him to make his house a place of refuge.”

The warrant directs that the defendant, when arrested, be taken before the justice. This must be done to give the justice jurisdiction of the person. *Colvin v. Luther*, 9 Cow., 61; *Bigelow v. Stearns*, 19 John., 39; *Millard v. Canfield*, 5 Wend., 61.

The statute authorizes the constable, in case the justice who issued the warrant be, upon its return, absent, or unable to hear or try the cause, or in case it shall be made to appear to such justice by the affidavit of such defendant that such justice is a material witness in the cause, to take the defendant before the next justice of the city or town who shall take cognizance of the cause and proceed thereon as if the warrant had been issued by him. *R. S.*, § 19 (*sec.* 21). If, therefore, the justice who issued the warrant cannot hear the cause, the officer should immediately take the defendant before another justice of the same town, and by oath or affidavit show the inability of the justice who issued the warrant to try the cause, when such “next justice” will have jurisdiction. From the opinion in *Arnold v. Steeves*, 10 Wend., 514, it seems that the process is

not spent when the "next justice" is also unable to hear the cause, and that a constable in such case would be authorized to take the defendant before a third justice of the city or town. The cause of action in that case, arose before the passage of the statute under consideration, but this is the reasonable construction of the law. Fairly construing the present statute, the twelve hours mentioned therein as the utmost extent of time that a defendant may be detained, do not commence running until he is brought before the justice who proceeds to try the cause as if the warrant had been issued by him. It would seem but just to the plaintiff, that the defendant should be detained in the custody of the constable while he is making a *bona fide* effort to find a magistrate to hear the cause.

The statute also directs that the constable notify the plaintiff of the arrest of the defendant. It may be a verbal or a written notification.

If both parties appear, the trial should proceed unless adjourned for cause. The justice should allow the parties a reasonable time to procure the attendance of witnesses and counsel, the constable in the meantime detaining the defendant in custody. The provision of the statute must be borne in mind, however, that upon the expiration of twelve hours from the time the defendant shall be brought before the justice, the justice must direct his release, unless within that time the trial of the cause shall have commenced, or unless it shall have been delayed at the instance of the defendant.

The plaintiff must recollect on his application for an adjournment, that if his motion is granted for a longer period than twelve hours, the defendant is, at the expiration of that time, released from the custody of the officer, although the *action does not abate*; but if an adjournment is obtained on motion of the defendant or by his consent, this rule does not apply. *Pope v. Hart*, 35 Barb., 638; *S. C.*, 23 How., 215.

OF PROCESS BY ATTACHMENT.

The process of attachment issues, under the Revised Statutes, in cases that relate to the *person* of a debtor. The Non-imprisonment Act (*Law of 1831*), embraces such cases as relate to the *property* of a debtor.

By the provisions of section 24 (§ 26) of the Revised Statutes, we see that process issued under this statute, must be for causes which relate to the *fraudulent disposition of the person of the debtor*: the justice must be satisfied that he has departed or is about to depart from the county where he last resided, and that, with the intent to defraud his creditors or to avoid the service of civil process; or that he is concealing himself with the like intent.

The Law of 1831 provides for such additional cases as respect the *fraudulent disposition of the property of the debtor*: it must be made to appear that he is about to remove his property from the county, or that he has assigned, disposed of, secreted, or is about to assign, dispose of or secrete, some of his property, with intent to defraud his creditors, and whether such defendant be a resident of this State or not.

Under the Revised Statutes, the application for an attachment may be made by the creditor or his personal representatives: the applicant must show by affidavit that his claim against the debtor is personal, whether liquidated or not, that it arose upon contract, or upon a judgment rendered *within this State* amounting to one hundred dollars, or any less sum. *Jurisdiction enlarged by sec. 53 of the Code, to two hundred dollars. See also sec. 71.*

Under the Law of 1831, the application must be made in the same manner: the applicant must show by affidavit that his claim is for debt or damages arising upon any contract express or implied, or upon *any* judgment for fifty dollars or less (*Jurisdiction enlarged by Law of 1842, chap. 107, to one hundred dollars*

or less, and by sec. 53 of the Code to two hundred dollars), and that such claim is over and above all discounts which the defendant may have against the plaintiff, specifying, as near as may be, the amount or balance thereof.

It will be seen, then, that under the Revised Statutes, an attachment may issue, if, with the intent to defraud his creditors or to avoid the service of civil process,

1. The debtor has departed from the county where he last resided ; or,

2. He is about to depart therefrom ; or,

3. He keeps himself concealed.

It will also be seen, that an attachment may issue, under the Law of 1831 and its amendments, whenever it shall appear to the justice,

1. That the defendant is about to remove from the county any of his property, with intent to defraud his creditors ; or,

2. That the defendant has assigned, disposed of, or secreted, any of his property, with the like intent ; or,

3. That he is about to assign, dispose of, or secrete, any of his property, with the like intent ; and

4. Either that the defendant is a resident, or a non-resident, of the State. *Garrison v. Marshall*, 44 How., 193 ; see also *Taylor v. Heath*, 4 Denio, 592.

But a debtor may dispose of his person, or his property, in any of the ways above mentioned, and yet there be no ground upon which to found an application for an attachment. The *nature of the demand* must be considered. Under the Revised Statutes, section 25 (sec. 27), it must arise,

1. Upon contract, whether the amount be liquidated or not ; or,

2. Upon a judgment rendered within this State, amounting to one hundred (*two hundred*) dollars or any less sum.

The Non-imprisonment Act multiplied the cases in which an attachment could issue, to,

1. Suits for the recovery of any debt or damages arising upon any contract, express or implied ;

2. Suits upon *any* judgment for fifty (*two hundred*) dollars or less.

Under both statutes, the application may be made by the creditor,

or his personal representatives, and under both, the demand must be against the debtor personally.

It follows, that an attachment cannot issue under either the Revised Statutes, or the Law of 1831, on a demand for a tort. Yet, where a judgment has been obtained for such tort, an attachment will issue upon a demand arising upon such judgment.

The law provides for a long, and a short, attachment. The two processes are so similar in most respects, as to admit of consideration under one head, after which the distinctive characteristics of short attachments will be noticed.

The Revised Statutes, require the application for an attachment to be in writing. § 26 (*sec.* 28). Neither the form, nor what it shall contain, are specified. The Law of 1831, is also silent in those regards. It merely states in what additional cases attachments may issue, and declares that all the provisions of the Revised Statutes, which are not inconsistent with the act or are not therein expressly repealed, are in full force; hence, applications under either law must be in writing. The application need state only enough to show the justice against whom the applicant requires an attachment, and that it is applied for under the statutes then in force, and applicable to such proceedings. The form may be as follows :

To P. F. ALLEN, Esq., one of the justices of the peace of the town of Saratoga Springs, in the county of Saratoga :

I, WM. H. BROWN, hereby make application to you, to issue an attachment in my favor (*or, in my favor as executor or administrator, etc., or, in favor of John Doe*), against the property of Ambrose Hillman, under and by virtue of the provisions of the several statutes of this state in such case made and provided.

WM. H. BROWN.

Dated the 13th day of *December*, 1873.

According to the statute, the application for an attachment may be made by any creditor, or by his *personal representatives*; that is, by his executors or administrators, etc.

The statute says, the application may be made by "any creditor." This, perhaps, would allow an application to be made by an agent of the creditor having authority to act, upon the principle *qui facit per alium, facit per se*. I cannot find, however, that this question has been decided, yet attachments have been sustained where the application was made by an agent, but no objection was taken, and the point was not raised or decided. *Millins v. Shafer*, 3 Denio, 60. So, on application for a short summons. *Ackerman v. Finch*, 15 Wend., 652. It is laid down both in Cowen's Treatise and Wait's Law and Practice, that an agent may make the application, but no authorities are cited. If the application is made by an agent, it should be signed after the following manner: "Vernon Todd, by Chas. H. Tefft, Jr., agent (or attorney)." *Millins v. Shafer*, 3 Denio, 60.

If the application is made without authority, but the creditor afterward sanctions it and proceeds with the action, it will be a sufficient ratification. *Ackerman v. Finch*, 15 Wend., 652.

The proof upon which an attachment issues must be written, that is, in the form of an affidavit. All the statements must be in writing—never verbal. *Comfort v. Gillespie*, 13 Wend., 404.

No attachment can issue without a proper affidavit setting forth the facts according to the nature of each particular case, whether the proceedings be under the Revised Statutes, or under the Non-imprisonment Act.

The affidavits are a part of the proceedings in the cause, and it is the duty of the magistrate to carefully preserve them. When once presented to the justice, they cease to be under the control of the plaintiff. They become part of the records of the case. *McCoy v. Hyde*, 8 Cow., 68.

It is the best practice for the magistrate to decline to draw the affidavit upon which the application for an attachment is founded, and thus avoid the slightest suspicion of interest in sustaining their sufficiency. In the administration of justice impartiality is the first, and should be the controlling, duty of a magistrate. His functions are entirely of a judicial character, and in whatever form his interest may appear, or however slight its character, he is as actually disqualified for adjudicating in the cause as though he were a party in the case. This was the principle at common

law, and it has been enforced by statute. 3 *R. S.*, 5th ed., 466, § 7. The courts have decided that this statute applies to a justice as well as to a judge, and that the same reasons exist for its application. *Baldwin et al. v. McArthur*, 17 *Barb.*, 414; *Oakley v. Aspinwall et al.*, 3 *N. Y.*, 547; *Edwards v. Russell*, 21 *Wend.*, 63. Another section of the statute following the one last cited, reads: "No judge of any court shall have a voice in the decision of any cause in which he has been counsel, attorney or solicitor, or in the subject-matter of which he is interested." 3 *R. S.*, 5th ed., 466, § 8. Upon the same principle, this would apply to justices of the peace. Then the question arises, will the statement of his case by a party, to a justice, and the drawing of the necessary affidavits by the justice, be acting in the capacity of an attorney? Would not a Supreme Court judge disqualify himself for acting judicially in a cause by drawing the papers in an attachment case in the Supreme Court? As is stated, the best practice is for the magistrate to decline to draw the papers upon which an application for an attachment is founded; he thus protects himself from censure, and places himself in that attitude of impartiality, which a magistrate cannot strive too earnestly to attain.

Affidavits preliminary to the actual commencement of a suit, or which are used as the foundation of a suit, should not be entitled. The reason assigned is, that at the time they are taken, no cause is pending in the court. *Haight v. Turner*, 2 *John.*, 371.

The original affidavits on application for an attachment, cannot be used as the ground for a new application in the same case. If the plaintiff fails on a first application for an attachment, and he desires to apply again, the affidavits must be again sworn to by the affiants. *McCoy v. Hyde*, 8 *Cow.*, 68; *Cutler v. Biggs*, 2 *Hill*, 409; *Robinson v. Sinclair*, 1 *How.*, 106; *Colegate v. Marsh*, 2 *How.*, 137; *Colver v. Van Valen*, 6 *How.*, 102; *Boyce v. Thompson*, 20 *John.*, 274; *Schemerhorn v. Noble*, 1 *Denio*, 682; *Prescott v. Roberts*, 6 *Cow.*, 45.

The impression prevails, that an affidavit should be sworn to before no officer, other than a justice of the peace of the same county in which the action is brought. There can be no objection, however, to the affidavit being sworn to before any officer of this State authorized to administer oaths, if taken within his jurisdiction.

The following section of the statute specifies what officers may administer oaths : “ Whenever any oath or affidavit is or may be required or authorized by law, in any cause, matter or proceeding (except oaths to jurors and witnesses in the trial of a cause, oaths of office, and such other oaths as are required by law to be taken before particular officers), the same may be taken before any judge of any court of record, any [justice of the peace in towns], commissioner of deeds, or clerk of any court of record; and when certified by any such officer to have been taken before him, may be read and used in any court of law or equity, of record or not of record, within this State, and before any officer, judicial, executive, or administrative, before whom any such cause, matter or proceeding may be pending, and affidavits, to be read in the Supreme Court, may also be taken by any commissioner appointed for that purpose by the justice of the said court.” 3 R. S., 5th ed., 474, § 38 (*sec.* 49.)

By chapter 360 of the Laws of 1859, notaries public are authorized to administer oaths and affirmations “ in all the cases where the same may now be taken and administered by commissioners of deeds, and under the same rules, regulations, and requirements, prescribed to commissioners of deeds, and such notaries’ acts may be performed without official seal.”

In the affidavit of the plaintiff, the nature of the claim against the defendant must be distinctly set forth. It is expressly required by the statute, that the affidavit should state that the demand arises upon contract or upon judgment, and if this requirement is not complied with, the attachment will be irregular. *In the matter of William Hollingshead*, 6 Wend., 553. But if the claim arise upon contract, the simple statement that it arises *upon contract*, is not sufficient in the opinion of Mr. Justice Foster in *Stevens v. Benton*, 39 How., 13; S. C., 2 Lans., 156. In that case the plaintiff made oath in writing that the defendant was justly indebted to him on a demand arising upon contract in the sum of two hundred dollars over and above all discounts, &c., &c. Upon the return day, objection was taken to the attachment on the ground that the affidavit on which it issued was insufficient, and the attachment wrongfully issued. The justice overruled the objection. The cause was then tried and judgment rendered in

favor of the plaintiff for \$126.25. The defendant appealed to the County Court for a new trial. Objection was there raised that the affidavit on which the attachment was issued was insufficient, in that it did not set forth sufficient facts and circumstances upon which to found an application for an attachment. The court refused to sustain the objection. The defendant appealed to the General Term. Justice Foster, in delivering the opinion of the court, says, he holds the affidavit on which the attachment was issued to be defective, as "no fact or circumstance appeared in the affidavit, from which it could be inferred that a warrant could not issue, except that the demand arose on contract, and yet in many cases of demands a warrant may issue under the act of 1831, although it arose on contract. The affidavit should have shown *how it arose on contract*, so that the justice could judge whether a warrant could issue or not, but as it was, the plaintiff swore to the law instead of the facts." *Morgan v. House*, 36 How., 326. It will be noticed, that the opinion states that no fact nor circumstance, appeared in the affidavit, from which it could be *inferred* that a warrant could not issue, except that the demand arose upon contract. Does it not follow then, if the affidavit had stated that the action arose upon contract for work, labor and services, done and performed by the plaintiff, for the defendant, and at his request, or if it had stated that it arose upon any contract not within the exceptions contained in the 30th section of the act of 1831, it would have been sufficient from which to "infer that a warrant could not issue," and would have shown "*how it arose on contract*?" Where a plaintiff states in his affidavit, that the defendant is indebted to him on a demand arising upon keeping his horses, it, in effect, describes a demand arising upon contract. *Williams v. Barnaman*, 19 Abb., 69.

In case an attachment is desired where the demand arises upon judgment, the affidavit should specifically describe such judgment, the title of the action, the court, when and where rendered, &c.

Section 71 of the Code provides, that "no action shall be brought upon a judgment rendered," &c. An attachment proceeding is the commencement of an action; therefore an attachment cannot be granted upon a judgment rendered by a justice of the peace, in the same county, within five years after its rendition,

except in certain specified cases. (The Code, however, in prohibiting the bringing of an action in the same county, upon a justice's judgment within five years after its rendition, does not forbid the use of such a judgment as a defense, set-off or counter-claim; especially by an assignee thereof. *Clark v. Story*, 29 *Barb.*, 295; *Wells v. Henshaw*, 3 *Bosw. Sup. Ct. Rep.*, 625.) No damage, however, results to the plaintiff from this limitation, for an execution may be issued any moment on such judgment, and in a much shorter time than the issuance of attachment papers requires. Subdivision 12, of section 64, of the Code, enacts that an execution may be issued on a judgment heretofore or hereafter rendered in a justice's court at any time within five years after the rendition thereof, and shall be returnable sixty days from the date of the same.

It has been questioned whether the affidavit should state that such judgment was not rendered within five years immediately preceding the application. This is an unsettled question. Mr. Wait, in his valuable work on the *Law and Practice in civil actions and proceedings in Justices' Courts*, inclines to the opinion that no more is needed in the affidavit than to state that the demand arose upon a judgment. He thinks that its rendition within the five years, could be pleaded and proved on the trial. May he not have overlooked the fact that it is a question of jurisdiction, and will more frequently arise upon objections to the sufficiency of the affidavit? It will be readily conceded, that if the affidavit does not show sufficient facts and circumstances within the meaning of the law, the justice has no authority or jurisdiction to issue process of attachment. While the statute authorizing justices to issue attachments gives them power to do so upon affidavit showing that the plaintiff's demand arose upon contract, yet it will be seen that the Code, which was passed since the statute, states explicitly that no action shall be brought upon a judgment rendered by a justice of the peace in the same county within five years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant or on all the defendants, or in case of the death of some of the parties, or when the docket on record of such judgment is or shall have been lost or destroyed.

These are positive and plain exceptions; as much so as are the exceptions in the law itself, where it states in section 31 that no warrant shall issue in any case, in which, by the provisions of section 30, an execution could not issue against the defendant's body. In the case of *Stevens v. Benton*, 39 How., 13 (S. U., 2 Lansing, 156), already commented upon, where the affidavit did not show that the demand was without those exceptions, it was held defective. The question is, does the Code modify the statute? Without expressing an opinion, I will add, that it would be the safest practice to fully state in the affidavit, and show to the satisfaction of the justice, that the judgment upon which the claim is made, comes within one of the exceptions mentioned in the Code, or that it was not rendered within the five years immediately preceding the commencement of the action.

Section 53, subdivision 4, of the Code, enlarges the jurisdiction of justices of the peace in attachment cases, to two hundred dollars. This amends the Revised Statutes and the Law of 1831 and those laws amendatory thereof, so that now an attachment may issue, in the proper class of cases, under the restrictions of section 71 of the Code, upon any demand for two hundred dollars or any less sum and upon a judgment *rendered within this State* for two hundred dollars or any less sum, if the action is brought under the Revised Statutes; and upon *any* judgment for two hundred dollars or less, if the action is brought under the Non-imprisonment Act.

If judgment is rendered upon an attachment for more than two hundred dollars, such judgment will be void. The case of *Mattison v. Baucus, Hill & Denio*, 321, in relation to the amount for which a justice may render judgment, was decided before the jurisdiction of the justice was extended by the Code to two hundred dollars, but the principle remains the same. This case also decides that if the plaintiff's claim in the attachment proceedings is sworn to be more than the law allows the justice to render judgment for, an attachment cannot legally issue. Justice Beardsley says: "The sum mentioned in the affidavit upon which this attachment issued, and in the attachment, was one hundred and five dollars and eighty-seven cents, and the constable was commanded to attach property to satisfy that debt. This was wholly

unauthorized ; a justice has no power to issue an attachment for any sum exceeding one hundred dollars. If he can do so for one hundred and five dollars, he can for five thousand. The justice plainly transcended his jurisdiction, and the plaintiff in the attachment who procured it to be issued and served, was a trespasser, and cannot set it up as a justification against any person."

Both the Revised Statutes, and the Law of 1831, require that the affidavit of the applicant shall state the indebtedness of the defendant over and above all discounts, the Law of 1831 adding, "specifying as near as may be the amount of such claim or the balance thereof." *Kelly v. Archer*, 48 Barb., 68.

The demand must be against the debtor personally—due from him in his own right—and not as executor, administrator, trustee, &c. ; otherwise, the plaintiff cannot obtain an attachment, neither could the defendant be made to answer such process in such representative capacity. The language of the statute is, "against such debtor personally," speaking of the debtor in his *individual* character, in contradistinction to the *representative* character of an executor or administrator, &c. *Jackson v. Walsworth*, 1 John. Cas., 372 ; *In the Matter of Hurd*, 9 Wend., 465. If, for any reason, the law makes a person acting in a representative character personally liable, then such process may issue. An attachment may issue upon an assigned demand, if brought within the provisions of the statute.

The statute authorizing the proceeding by attachment, makes no provision for cases where the debtor's name is unknown, and the proceeding being a statutory one, and summary in its character, it has been held doubtful if it could be sustained against a person under a fictitious name. An attachment issues on proof to the justice that the defendant has committed a fraudulent act ; and how can such a fact be established of a person who is unknown ? And if suit were commenced and judgment obtained, there would be nothing to show against whom, in fact, the suit was brought. *McCabe v. Doe, owner of the steamship "Sarah Sands,"* 2 E. D. Smith, 64 ; *Davenport v. Doady*, 3 Abb., 409.

When defendants are jointly liable for a debt, an attachment may issue in form against all the debtors ; and if service be made upon one or more, the statute allows a joint judgment to be

rendered against all; and an execution to issue and levy to be made upon the joint property of all the defendants, or upon the separate property of those defendants personally served with process, and such property sold to satisfy the execution. If process of attachment is not issued against all of the defendants those who are personally served with process may plead in abatement the non-joinder of defendants, and the justice will be bound to dismiss the action. If the claim is due both jointly and severally, the plaintiff may proceed against one, or all, of the defendants.

Article 8, section 3, of the State Constitution of 1846, reads as follows: "The term corporations, as used in this article, shall be construed to include all associations, and joint stock companies, having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts, in like cases as natural persons." If corporations can be sued in all courts in like cases as natural persons, it would seem that an attachment could issue against them, if a case were made out within the law. In the case of *Johnston v. Cayuga & S. R. R. Co.*, 11 Barb., 621, Justice Shankland remarks, incidentally, for the point was not raised in the case, that "the provisions made by statute for process by warrant, attachment, and short summons, are for the cases of natural persons sued as defendants, and not corporations. The words 'resident' and 'non-resident,' used in the statute, in respect of process by warrant and short summons, seem inappropriate when applied to corporations." This action was decided in May, 1852. In the case of *Sherwood v. Saratoga & W. R. R. Co.*, 15 Barb., 650, decided in July, 1852, the plaintiff brought an action against the defendant by short summons. Justice Willard, in this case, construes the statute differently. He says: "This is not a case where a short summons was admissible under section 33 of the Non-imprisonment Act. That section gives a short summons against a defendant only in cases where he resides out of the county, and cannot be proceeded against by warrant under the 30th section of the same act. The defendant was not exempt by virtue of the 30th section, but from the very nature of its being. The justice had no jurisdiction of the corporation as a non-resident. It is only upon the notion that

the corporation might be treated as an inhabitant of Washington county, that he could entertain jurisdiction at all. In my judgment, a railroad corporation, whose road passes through two or more counties, may be sued before a justice in either county, provided the process can be served on the proper officer in such county. A railroad company must be treated as an inhabitant and freeholder in each county where its track is laid." The opinion of Judge Willard is concurred in by the General Term of the Common Pleas of the county of New York, in the case of *Wilde v. N. Y. & H. R. R. Co.*, 1 *Hilton*, 302, decided in *May*, 1857. Judge Brady, in giving the opinion of the court in this case, remarks: "The Code, section 53, confers civil jurisdiction in certain actions, of which the present is one; and section 54 declares, that no justice of the peace shall have cognizance of a civil action in certain cases, not including, however, actions against corporations. The Constitution, section 3, of article 8, declares, that corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons. There can be no doubt that an action can be entertained against a resident corporation, and, as we shall see, that such corporation may be sued by a non-resident plaintiff, by short summons. The 32d section of the act abolishing imprisonment for debt provides, that whenever, by the provisions of section 31 of that act, no warrant can issue, and the plaintiff shall be a non-resident of the county, and shall give like proof of the fact, and shall give the security required by law, the justice shall issue a summons, which may be made returnable not less than two nor more than four days from the date thereof, and shall be served, &c. In this case the plaintiff was a non-resident, and complied with the statute on obtaining the summons, and the court below acquired jurisdiction of the cause. This disposes of the objections to the validity of the plaintiff's judgment." In the following cases, corporations are held to be persons, inhabitants, and residents, by construction, for the purpose of suing and being sued. *The People v. Shoomaker*, 63 *Barb.*, 44; *Stevens v. The Phoenix Ins. Co.*, 44 *N. Y.*, 149; *Conroe v. The National Protection Ins. Co.*, 10 *How.*, 403, and the cases there cited.

From the foregoing, it would seem that if an action can be brought against a corporation as an inhabitant or freeholder, person or resi-

dent of a county, that the status in law of a corporation is the same as that of an individual, and that it can be proceeded against by attachment.

Section 35, of the Law of 1831, provides that before any attachment shall issue, "the plaintiff shall, by his own affidavit, or that of some other person or persons, prove to the satisfaction of the justice," &c. Thus it will be seen that any person having knowledge of the necessary facts, may make the affidavit upon which an attachment issues. By the Revised Statutes, section 26 (sec. 28), the justice has power, and it is made his duty, "on being requested so to do, to issue his subpœna to compel the attendance of any witness forthwith to make such affidavit." If the command in the subpœna is not obeyed, the magistrate has power to punish the disobedient witness, as in other cases. The following may be used as a form for such subpœna :

SARATOGA COUNTY, ss. :

To John Penfield and Edgar Ham, greeting: In the name of the People of the State of New York, you and each of you are hereby commanded to appear forthwith, personally, before me, the undersigned, a justice of the peace of said county, at my office in Ainsworth's Building, in the town of Saratoga Springs, in said county, to make an affidavit of all and singular those things, which you or either of you may know ; touching an application made to me by Timothy Holmes, for an attachment against the property of Ambrose Hillman, or of any facts and circumstances tending to establish the grounds of said application. Given under my hand, this 20th day of February, 1874.

P. F. ALLEN,
Justice of the Peace.

A refusal on the part of the witness, to appear and testify to facts and circumstances material to the application for an attachment, would render him subject to fine and punishment.

In the affidavit to procure an attachment, *facts and circumstances* should be stated ; inferences, arguments, and hearsay state-

ments, do not afford the legal evidence upon which a justice can determine whether an attachment should issue: neither does the belief of the affiant, except as to the *intent* of the debtor to defraud his creditors, and then, only, provided he sets forth the facts and circumstances upon which such belief is founded. *Johnson v. Moss*, 20 *Wend.*, 145; *Fulton v. Heaton*, 1 *Barb.*, 552; *Stewart v. Brown*, 16 *Barb.*, 367; *Dewey v. Greene*, 4 *Denio*, 93; *Tallman v. Bigelow*, 10 *Wend.*, 420; *Camp v. Tibbetts*, 2 *E. D. Smith*, 20. The affidavit should state positively, all the facts and circumstances necessary to entitle the plaintiff to an attachment, and in addition thereto, it should state upon belief, that the acts so sworn to, were done by the defendant for the purpose of defrauding his creditors. *Fulton v. Heaton*, 1 *Barb.*, 552; *Ex parte Robinson*, 21 *Wend.*, 672; *Johnson v. Moss*, 20 *Wend.*, 145; *Colver v. Van Valen*, 6 *How.*, 102. It is not sufficient to set forth the facts, and leave it to the justice to infer the intent. *Comfort v. Gillespie*, 13 *Wend.*, 404; *Miller v. Brinkerhoff*, 4 *Denio*, 118. The facts and circumstances sworn to, must be within the knowledge of the deponent. Information derived from others is not evidence. *Tallman v. Bigelow*, 10 *Wend.*, 420. The admissions of the defendant, however, are always competent evidence.

Where a statute requires proof, legal proof is meant; and if an attachment is issued upon other than such proof, it will be void. The justice, upon application for an attachment, must be satisfied from the facts and circumstances as related in the affidavit. If these are stated merely upon belief or upon information, they are insufficient evidence. The affiant's belief is neither a fact nor a circumstance upon which the justice can base a legal decision. *Ex parte Haynes*, 18 *Wend.*, 611. In the case of *Cadwell v. Colgate*, 7 *Barb.*, 253, the witnesses stated in their affidavits that Woodworth (the debtor) then resided out of the State, as each of said persons verily believed to be true. Judge Parker says: "This was clearly insufficient to give jurisdiction. The statute requires that the facts and circumstances to establish the grounds on which the application is made, shall be verified by the affidavit, etc. Here no fact or circumstance was stated, and it is no proof whatever for a witness to state his belief of a fact. A man may be able to swear to his belief, when he has no personal knowledge of

the facts necessary to be established. Such testimony is never received in a court of justice." *Decker v. Bryant*, 7 Barb., 182; *Matter of Faulkner*, 4 Hill, 598; *Stassler v. Fairchild*, 3 N. Y., 41; *Van Alstyne v. Erwine*, 11 N. Y., 331; *Castellanos v. Jones*, 5 N. Y., 164; *Haggart v. Morgan*, 5 N. Y., 422. These decisions, which construe the Revised Statutes in attachment cases, were rendered in actions brought in courts of record. But the requirements of the act of 1831 being the same in this regard, in relation to attachments in justices' courts, they may properly guide the action of these inferior courts.

The facts necessary to be set forth in the affidavit should be stated affirmatively; not by inference, nor by way of description or recital. Where an agent makes the affidavit, he must expressly swear that he is such agent. In the case of *Ex parte The Bank of Monroe*, 7 Hill, 177, the deponent was named in the affidavit as agent, but it omitted to state in direct terms that he was such agent. The court held the affidavit defective, on the ground that it did not appear to have been made by the agent. The court say: "Although the deponent is therein named as agent, this is a mere *descriptio personæ*, and there is no oath to the fact of such agency." See also *Cunningham v. Goelet*, 4 Denio, 71; *The People ex rel. v. Perrin*, 1 How., 75. So, where it is required that the affidavit be made by the attorney, the affidavit must state positively that the deponent is an attorney. *Ex parte Shumway*, 4 Denio, 258; see *People v. Ransom*, 2 N. Y., 490. Also, where deponent's residence is a fact material to be shown by the affidavit, it is not a sufficient statement of his residence to add the name of the place, as matter of description to his name, thus: "Giles Sanford, of the city of Albany, being duly sworn, says," &c. The court say: "It is obvious that the application contains no statement or averment in express terms, that Giles Sanford resided at Albany. But if the recital contained in the application, of his being "of the city of Albany" could be held to amount to a positive or express statement of the residence of Sanford, that fact is not verified by his affidavit; there is no *oath* to the fact of his residence." *Staples v. Fairchild*, 3 N. Y., 41. Following this, is the case of *Payne v. Young et al.*, 8 N. Y., 158. The question decided, was, whether a certain application, made to the

recorder of New York, for an attachment, *stated that the applicants were residents of the city and county of New York*. The application commenced: "The application of Charles L. Young, Jeremiah B. Taylor and James W. Healey, all of the city of New York," &c. It was verified by Taylor, as follows: "Jeremiah B. Taylor, one of the above applicants, being duly sworn, says; that the *matters stated* in the above application, are true of his own knowledge." It was insisted that the affidavit of Taylor, verified all of the *matters stated* in the application. The opinion of the court, is as follows: "I think that it is a mistake to say, that the fact of residence of the applicant, is a matter *stated* in the application; and therefore, there is no oath to the fact of residence. It is a jurisdictional fact." "Averments of facts upon which jurisdiction in such and in similar cases depends, must be positive, and it is not sufficient that jurisdiction may be inferred argumentatively, from what appears in the application or petition."

Facts and circumstances as evidence of the existence of the *grounds* upon which the attachment is to be issued, must be set forth in the affidavit. To allege, for instance, that the debtor has departed, or that he is about to depart from the county where he last resided, with intent, &c., is not sufficient; such facts and circumstances must be stated, as will establish these grounds. *Johnson v. Moss*, 20 *Wend.*, 145; *Ex parte Robinson*, 21 *Wend.*, 672; *Stewart v. Brown*, 16 *Barb.*, 367; *Cadwell v. Colgate*, 7 *Barb.*, 253.

If the ground of the application be the concealment of the debtor, with intent to avoid, &c., the affidavit must state such facts and circumstances as will support that ground. From the case of *Dudley v. Staples*, 15 *John.*, 196, decided in 1818, under the statute then existing—which was in substance the same as our Revised Statute—we see that the mere fact of not being able to serve a single warrant upon a traveler, who for many reasons might wish to avoid the arrest without being chargeable with an intent to defraud his creditors, is not that kind of evidence of concealment contemplated by the statute. Judge Cowen remarks upon this case, in part 1 of his Treatise, page 487: "But I should conceive that in ordinary cases, diligent but unsuccessful search by an officer, in order to make a personal service of a justice's process, would be the most satisfactory kind of evidence upon

which to issue an attachment, especially so when connected with other suspicious acts and circumstances. It exhibits one of the specific cases supposed by the statute—a concealment to avoid the service of civil process.” If the officer should embody such a statement in an affidavit, it would be the best evidence that could be offered of a concealment of the debtor.

A mere return to an execution that the defendant cannot be found, is not sufficient evidence of the concealment of the debtor with a fraudulent intent. In the case of *Vosburgh v. Welch*, 11 *John.*, 174, it appeared that the defendant, as justice, issued an attachment against Vosburgh, without oath. Previous to the issuance of this attachment, Welch had issued an execution against Vosburgh on a judgment obtained before him, on which execution the constable had returned that neither the goods nor the body of the defendant could be found. Welch contended that this was sufficient proof of Vosburgh having absconded, to warrant the issuance of the attachment. The court held, that the evidence upon which the justice acted was insufficient; that it did not amount even to the information of the constable that the debtor was concealed, with intent to defraud his creditors, or to avoid being served with process; that the return of the constable on an execution against the debtor, was not satisfactory proof within the meaning of the law; and the justice must be considered as having issued the attachment without any proof whatever of the concealment required by the act, and, of course, without any authority.

In all cases where the attachment issues on the ground of concealment, with intent, &c., the affidavit should state that the process which the defendant avoids, is a civil process. In the case of *Lynde v. Montgomery*, 15 *Wend.*, 461, it was held that an attachment issued by a justice against a debtor, keeping himself concealed to avoid the service of civil process, was not supported by an affidavit that he kept himself concealed to avoid the service of a warrant issued under the fourth section of the act to abolish imprisonment for debt, &c., unless it also affirmatively appeared that he was charged only with an intent to commit a fraud, or with fraudulently contracting the debt: unless it so appear, as the process *may be criminal*, it consequently is not shown that the debtor concealed himself to avoid the service of *civil* process.

The departure, or being about to depart, or concealment, applies only to the county where the debtor *last resided*—that is, the departure must be from that county, or the concealment within it.

The intention to defraud creditors by the disposition of property, must be *affirmatively* shown; otherwise the disposition will be presumed legal. *Miller v. Brinkerhoof*, 4 *Denio*, 118; *Mott v. Lawrence*, 9 *Abb.*, 196; *Fulton v. Heaton*, 1 *Barb.*, 552; *Stewart v. Brown*, 16 *Barb.*, 367; *Taylor v. Harker*, 1 *E. D. Smith*, 391. A *prima facie* case within the provisions of the statute must be made out—that is, the facts and circumstances must clearly evidence such a fraudulent intent as is contemplated by the statute. Thus, an affidavit for an attachment on the above ground, setting forth that the defendant has executed a mortgage of a part of his property and refused to confess a judgment or give security for the demand, declaring a determination to manage his property himself, is not sufficient. And although a judgment rendered in a cause commenced by an attachment issued on such an affidavit, would be upheld, as valid until reversed, yet on *certiorari* the court above would reverse it, on the ground of the insufficiency of the affidavit. *Connell v. Lasscelles*, 20 *Wend.*, 77.

In the case of *Wilson v. Britton*, 26 *Barb.*, 562, the plaintiff's affidavit stated that the defendant, while attempting to compromise with one of his creditors, told him that if he would not accept a specified proportion of his demand, he would go home and make an assignment of his property and that the plaintiffs would not get anything of their claims; that he would put his property out of his hands sooner than pay them more than 33 $\frac{1}{3}$ per cent of the amount of their debt. The court say: "The defendant probably meant by the emphatic representation of the course which he intended to pursue, to induce the plaintiffs and his other creditors, to compromise their claims, and to save him the necessity of making an assignment. But, however strenuously he might have urged this upon their attention, it amounted to nothing more than that he was determined, if they did not compromise, to make an assignment. This was the whole substance of it, and we cannot pronounce this to be a threat to make a fraudulent disposition of his property unless we are prepared to stigmatize that as fraudulent which the law expressly sanctions."

In the case of *Anderson v. O'Reilly*, 54 Barb., 620, where the circumstances were that the defendant when called upon, on several occasions, to pay the plaintiff's debt, put him off, stating that her husband every night took all the money which she had received during the day and paid it to persons from whom she had bought goods, which payment was disproved by affidavit, it was held, that the act of the defendant in allowing her husband to take possession of all her money, coupled with a falsehood as to the purpose for which he took it, was to be deemed done with intent to defraud her creditors; that she was, therefore, amenable to the charge of having "disposed of" her "property with intent to defraud" them; and that consequently the plaintiff was entitled to a warrant of attachment, under the provisions of section 229 of the Code.

It is not necessary, however, that the facts stated in an affidavit for an attachment, under the act of 1831, should be decisive of a design on the part of the debtor to assign or dispose of his property with the intent to defraud his creditors. It is sufficient if they *legally aim or tend* to sustain that averment. *Cooney v. Whitfield*, 41 How., 6; *Talcott v. Rosenberg*, 8 Abb., N. S., 287. In the former case it was held that the facts and circumstances there stated, taken together, furnished, while uncontroverted, sufficient evidence upon the point of the defendant's *fraudulent intent respecting the disposition of his property* to uphold the attachment. This was a decision of the General Term of the Common Pleas of the county of New York, and the proposition is quite as broad as the courts will ever sustain.

The statute requires the plaintiff to prove the facts and circumstances entitling him to an attachment, *to the satisfaction of the justice*. This means that the proof must be sufficient to satisfy the magistrate *judicially*. The justice must act upon legal evidence, and that evidence must be contained in the papers presented to him. He cannot act upon his own knowledge of any facts connected with the action, however well founded it may be—he is confined to the evidence before him. *Mott v. Lawrence*, 9 Abb., 196; *Stewart v. Brown*, 16 Barb., 367; *Frost v. Willard*, 9 Barb., 440; *Money v. Tobias*, 12 John., 422; *Burlingham v. Deyer*, 2 John., 188; *Rosekrans v. Van Antwerp*, 4 Johns., 228.

"It is the duty of courts of justice, if the provisions of the law

are to be respected and maintained, to resist the seemingly growing disposition to make applications for attachments, as well as for other provisional remedies, upon very imperfect proofs." *Skiff v. Stewart*, 39 *How.*, 385. Judge Cowen, in his Treatise, part 1, page 481, alluding to the case of *Tallman v. Bigelow*, 10 *Wend.*, 420, thus dilates upon this subject: "I may safely assert, from a no very limited experience in suits instituted by this kind of process, that, in nine cases out of ten, attachments are issued upon affidavits equally defective with those in the case referred to. You will seldom find a *fact* alleged in the affidavit. The plaintiff is always particular to state his *suspicions* and *belief*, without setting forth a single *fact* or *circumstance*, save perhaps a *rumor in the neighborhood* or *general information*, upon which that suspicion or belief is grounded. I am aware that suits commenced by attachments are, in most cases, hasty proceedings. * * *

* * * * *

But the mere fact, that applications for attachments are hasty proceedings, is not enough to justify a violation of the simplest and most familiar rules of evidence. It should be recollected that an attachment is an extraordinary and summary process, given only in extreme cases; and, for this reason alone, greater caution should be exercised in resorting to this mode of proceeding."

While it is necessary that the affidavit should state facts and circumstances sufficient to authorize the issuance of an attachment, it is not necessary that it should show such sufficiency beyond a doubt, in order to protect the magistrate from damages in an action of trespass. It is enough in such collateral action, if the legal evidence be merely colorable; the justice would have jurisdiction of the case, so that the judgment would be valid until reversed. Such proof would probably protect the justice, and all others acting under the judgment. *Vosburgh v. Welch*, 11 *John.*, 175; *Loder v. Phelps*, 13 *Wend.*, 46; *Ex parte Robinson*, 21 *Wend.*, 672; *Miller v. Brinkerhoff*, 4 *Denio*, 118; *Frost v. Willard*, 9 *Barb.*, 440; *Stewart v. Brown*, 16 *Barb.*, 367; *Colver v. Van Valen*, 6 *How.*, 102.

The magistrate should be careful to have the legal evidence upon which he grants the attachment appear in the moving papers, so that if appealed, the court of review may correctly judge

whether the facts were legally sufficient to justify him in issuing the attachment. As the court above, decides the case upon questions of law, the preliminary papers should contain all the facts and circumstances stated in the court below.

The term, venue, as applied to an affidavit, means the county in which the affidavit is sworn to. For example: Saratoga county, ss. The letters ss., are an abbreviation of the words *licet* and *scire*, and mean, when used to usher in the facts in an affidavit—it is permitted to know.

In *Cook v. Staats*, 18 Barb., 407, it was decided at General Term that the venue is an essential part of an affidavit, and is *prima facie* evidence of the place where the affidavit was taken. An affidavit without a venue is a nullity, although sworn to before an officer whose residence is mentioned in the jurat. Justice Johnson, in the case of *Lane v. Morse*, 6 How., 394, says: "An affidavit should show upon its face that it was made before some officer competent to take affidavits and within some place where he was authorized by law to administer an oath. This, at least, would seem to be necessary to show a legal verification." "No presumption arises that an affidavit has been made at any particular place within the State; nor, indeed, that it was made within the limits of the State, where no place is mentioned." 1 Barb. Chan. Prac., 601.

Where the *venue* in an affidavit is laid in one county, and the officer before whom it is sworn resides in another—held bad, for want of jurisdiction. *Davis v. Rich*, 2 How., 86; *Sandland v. Adams*, 2 How., 127; *Snyder v. Olmstead*, 2 How., 181; *Cook v. Staats*, 18 Barb., 407.

The *jurat* is the clause at the foot of the affidavit, showing when, and before whom, it was sworn.

As to whether it is essential, that the officer should sign the jurat, and that it should contain his official description, see *Jackson ex dem. Root v. Stiles*, 3 Caines, 128; *Livingston v. Cheetham*, 2 John., 479; *Chase v. Edwards*, 2 Wend., 283; *The People ex rel. Churchill et al. v. Rensselaer C.P.*, 6 Wend., 543.

An affidavit, where nothing appears to show that it was taken out of the jurisdiction of the officer before whom it was sworn, will be presumed to have been taken within the limits of his

jurisdiction. *Parker v. Baker*, 8 *Paige*, 428. And where the name of the county in the venue was left blank and the oath was signed "O. O., Commissioner of Deeds," without specifying the city or county, on its being shown that O. was a commissioner of deeds of Albany county, held: that as the officer was authorized to administer the oath only within the city of Albany, the legal presumption was, that he had not violated his duty and administered it elsewhere.

The officer may administer the oath to the affiant in the following words: "You do swear that the contents of the affidavit subscribed by you, are true." Or, in case of affirmation: "You solemnly and sincerely declare and affirm, that the contents, &c."

An affidavit, is defined to be a statement or declaration reduced to writing, and sworn to or affirmed before some officer who has authority to administer an oath. Yet it has been decided in the law courts, that the subscription of the name of the affiant is unnecessary, where his name is recited at the beginning of the affidavit, and where the jurat is signed by an officer duly authorized to take affidavits. *Haff v. Spicer*, 3 *Caines*, 190; *Jackson v. Virgil*, 3 *John.*, 539.

In chancery, however, it has been held that all bills, answers, petitions, and affidavits, must be subscribed by the party who verifies them, "for without such signature, it would be difficult, if not impossible, to sustain a prosecution for perjury; especially, where no persons other than the deponent and the officer administering the oath were present, when the former was sworn." *Hathaway v. Scott*, 11 *Paige*, 173.

An affidavit showing grounds under the Revised Statutes and also under the act of 1831, will authorize the issuance of an attachment under either: but if a summons be issued against the defendant, it will be presumed that it was issued in conformity with the act of 1831. *Reinmiller v. Skidmore*, 7 *Lans.*, 161.

The statute requires the grounds for the issuance of the attachment to be stated in the affidavit, that the magistrate may know how to proceed upon the return day of the process; for if the attachment issues under the Revised Statutes, and the property of the debtor is seized by the officer but no personal service is or can be made upon the defendant, the justice must proceed upon

the return day the same as he would upon the return day of a summons. *Stewart v. Brown*, 16 Barb., 367.

But if the attachment issues under the Law of 1831, and no personal service is made on the defendant, but the property is attached and the defendant does not appear on the return day of the process, then the magistrate must issue a summons against the debtor. Upon the return of this summons either personally served, or that the defendant cannot be found after diligent inquiry, the justice may proceed in the case. If the defendant appear on the return day, no summons can be issued, nor can a summons be issued if the attachment and inventory are personally served. *Rosenfield v. Howard*, 15 Barb., 546; *Taylor v. Harker*, 1 E. D. Smith, 391; *Conway v. Hitchkins*, 9 Barb., 378.

As the grounds stated in the affidavit govern the magistrate in his action on the return day, the plaintiff should decide under which law he will proceed and frame his affidavit accordingly. If the grounds stated in the affidavit should bring the case under both the Revised Statutes and the Law of 1831, the plaintiff may, on the return day, elect under which he will proceed; but the material facts to give the justice jurisdiction, under either the Revised Statutes or the Law of 1831, must be stated. In such cases, the rule of law that the statute must be strictly complied with, will be rigidly enforced by the courts. *Garrison v. Marshall*, 44 How., 193.

The law gives no direction which kind of a summons—long or short—may be issued by the justice upon the return day, when proceeding under the Law of 1831. If a case is made for a short summons, there can be no doubt that it is the proper process. Where the law provides for the issuance of a summons, it means a long or a short summons, as the residence of the parties may justify.

Attachments issued under the Revised Statutes, and the Law of 1831, are the original process by which suits are commenced, and as the jurisdiction of the magistrate under those laws depends upon the facts set up in the affidavits, the sufficiency of such affidavits is necessarily a jurisdictional question, and if they fail to state facts sufficient to confer jurisdiction, the defect cannot be supplied, either by amendment or supplemental affidavits. Judge Cowen, in the case

of *Ackerman v. Finch*, 15 *Wend.*, 152, says: "It is clear that a justice cannot by amending a proceeding in a particular which is necessary to give him jurisdiction, acquire an authority *nunc pro tunc*."

It has been held in attachment cases under the Code, that the original affidavits may be amended, and that supplemental affidavits may be read to assist in making out a case under its provisions, but such decisions are based upon the ground that under the Code an attachment is not an original process; that by it a suit is not commenced, but that it is a remedy in a suit already commenced. *Furman v. Walter*, 13 *How.*, 348; *Genin et al. v. Tompkins*, 12 *Barb.*, 265.

Where the defendant intends to object to the affidavit of the plaintiff or to any of the papers in the case, he should do so before pleading, by special objection, for if he pleads the general issue, he waives the question of regularity and is concluded by such plea from raising it on appeal. This does not apply, however, to an objection to the jurisdiction of the court. *Dewey v. Greene*, 4 *Denio*, 93; *Fift v. Culver*, 3 *Hill*, 180; *Fanning v. Trowbridge*, 5 *Hill*, 428. In the case of *Culver v. Van Valen*, 6 *How.*, 102, it is held that where opportunity is given for objections and none are made, but the party whose duty it is to object remains silent, all reasonable intendments will be made by a court of review to uphold the judgment. The case cites *Jenks v. Smith*, 1 *N. Y.*, 90, and *Baldwin v. Calkins*, 10 *Wend.*, 167. In the latter case, the Supreme Court held, that an omission to object, would even authorize the inference of a fact necessary to confer regularity. Consent cannot give jurisdiction but cures irregularity. The statute should be followed strictly, and under objection, the justice should dismiss the proceedings unless its provisions have been complied with.

"The rule, applicable to all inferior and limited tribunals, is, that their jurisdiction is never presumed, but on the contrary must be alleged and proved. When the jurisdiction of the court or officer is made to depend on the return of process in a given form, or proof of a particular fact, and the return is not substantially in the form prescribed, or the fact is not proved, the court or officer does not acquire jurisdiction, and the proceedings are utterly void." *Stone v. Miller*, 62 *Barb.*, 430; *Money v. Tobias*, 12 *John.*, 422;

Smith v. Luce, 14 *Wend.*, 237. If the defendant does not appear, the magistrate should be extremely cautious in his proceedings, for in such a case the law holds, in effect, that all objections are taken which could possibly have been taken, had the defendant been present. And where the proceedings, in such a case are found to be either irregular or void, the magistrate should dismiss the action. It has been held that where the process is void, the magistrate is personally liable for all damages which may result from the issuance of such process. So held where a bond was not given. *Davis v. Marshall*, 14 *Barb.*, 96. The rule as to the liability of the justice is, that where he has no jurisdiction whatever and undertakes to act, his acts are *coram non judice* and void; as void as if he were not a justice. If he has jurisdiction, but errs in exercising it, then his acts are not void but only voidable. In the former case, he is personally liable; in the latter, not. *Case v. Shepherd*, 2 *Johns. Cases*, 27; *Butler v. Potter*, 17 *John.*, 145; *Skinnon v. Kelley*, 18 *N. Y.*, 355; *Bigelow v. Stearns*, 19 *Wend.*, 39; *Vosburgh v. Welch*, 11 *Johns.*, 175; *Adkins v. Brewer*, 3 *Cow.*, 206; *Rogers v. Muliner*, 6 *Wend.*, 597; *Hoose v. Sherrill*, 16 *Wend.*, 33. Justice Bronson, dissents from the principle laid down in the last two cases.

If the defendant intends to make objections to the regularity of the attachment papers, he should do so distinctly and specifically, and state every and all of his objections and state them separately, for if he neglect to offer them in the court below, he waives them, and is precluded urging them on appeal.

The justice may dismiss the action at any time before entering judgment.

In the case of *Field v. McVickar*, 9 *John.*, 130, McVickar sued out an attachment against Field, as a debtor concealed within the county with intent to defraud creditors and to avoid process, &c. The attachment was regular and both parties appeared on the return day. Field pleaded in abatement, that at the time of the issuance of the attachment he was not concealed, &c. The plaintiff demurred. The justice overruled the plea in abatement, and Field left the court without making any further defense. McVickar proved his demand and the justice gave him judgment. On *certiorari* it was held, that the objection could not prevail. "If the attachment

proceedings were regular, which in this case was not questioned, the justice had no power to supersede the attachment, but must on the return thereof, proceed to hear the cause, as on any other process." *Mott v. Lawrence*, 9 Abb., 196.

The case of *Schroepel v. Taylor*, 10 Wend., 196, was an action of trover. Taylor sued Schroepel for two horses and other property deposited with Schroepel by a constable, who had taken the same by virtue of two attachments against Taylor. The cause came up on error from the Common Pleas to the Supreme Court. The court held, that the attachment having been issued upon due proof and security, was a valid process and a justification to the officer and to those who acted at his instance or under his authority. Chief Justice Savage in delivering the opinion of the court said: "Had the defendant in the attachment here, appeared before the justice and shown the fact of his residence in another county, and the other facts which appeared on the trial of this cause, he would have been entitled to a judgment in his favor."

These cases seem to decide, that facts legally established in the plaintiff's affidavits in attachment suits, cannot be controverted by pleading in abatement, but may be shown in defense on the trial of the case, where denied by plea. And it seems to me that the case of *Shannon v. Comstock*, 21 Wend., 457, sustains this position. In that case, Justice Cowen says, in delivering the opinion of the court: "But certainly the affidavit was not conclusive. It was still open to be met by the defendants, on proof that it was made under a plain mistake. That was admitted, and the justice should, therefore, have dismissed the suit." Here was the fact of the non-residence of the defendant, sworn to in the affidavit of the plaintiff, which was sufficient to give the justice jurisdiction, yet on the return day it was admitted to be untrue. Certainly, then, the fact authorizing the magistrate to issue process was not legally established, and, as the court said, the justice should have dismissed the suit. The admission of the residence of the defendant, divested the justice of authority to entertain the proceedings. It was a jurisdictional question. The process was a warrant, but the principle is applicable to attachments.

If the defendant is a resident of the county where the application for an attachment is made, the justice must issue what is

called a long attachment ; that is, one returnable not less than six nor more than twelve days from the date of its issuance. It depends upon the residence of the defendant and not upon that of the plaintiff, whether a long or a short attachment should issue. *Section 33 of Law of 1831*; *Johnson v. Moss*, 20 *Wend.*, 145; *Smith v. Weed*, 20 *Wend.*, 184; *Bowne v. Mellor*, 6 *Hill*, 496; *Thompson v. Sayre*, 1 *Denio*, 175; *Garrison v. Marshall*, 44 *How.*, 193.

The following form of affidavit may be used :

SARATOGA COUNTY, ss. :

Timothy Holmes, being duly sworn, says, that Ambrose Hillman is justly indebted to this deponent on a demand arising upon contract (*here state the nature of the demand, as for instance, for work, labor, and services*) (or, upon a judgment, and if so, describe the judgment fully), in the sum of * * * * * dollars, as near as this deponent can estimate the same, over and above all discounts which the said Hillman has against him ; that the application for an attachment against the property of the said Hillman which accompanies this affidavit, is made on the ground (*if under the Revised Statutes*), that the said Hillman has departed from the county of Saratoga where he last resided, with intent to defraud his creditors or with intent to avoid the service of any civil process ; (*or, on the ground that the said Hillman is about to depart from the county of Saratoga where he last resided, with intent to defraud his creditors or with intent to avoid the service of any civil process ; or, on the ground that the said Hillman keeps himself concealed within the county of Saratoga where he last resided, with intent to defraud his creditors or with intent to avoid the service of any civil process ;*) or (*if under the Law of 1831,*) on the ground that the said Hillman is about to remove his property from the county of Saratoga with intent to defraud his creditors ; (*or, on the ground that the said Hillman has assigned, disposed of, or secreted his property, with intent to defraud his creditors ;*) (*or, on the ground that the said Hillman is about to assign, dispose of, or secrete his property, with intent to defraud his creditors :* and deponent further says, that the said Hillman is a resident (*or a non-resident,*) of the State of New York.)

And deponent further says, (*here set forth such facts and circumstances as bring the case upon any of the foregoing grounds, and which prove a fraudulent intent.*)

And deponent further says, that he believes the acts so done by the said Hillman, were done with the intention of defrauding his creditors.

TIMOTHY HOLMES.

Sworn and subscribed before me this }
20th day of *February*, 1874. }

JOHN FOLEY,

Justice of the Peace.

A bond is a sealed instrument. Chief Justice Kent in *Warren v. Lynch*, 5 *John.*, 238, says: "A seal, according to Lord Coke, is wax with an impression. A scrawl with a pen is not a seal and deserves no notice. *Sigillum est cera impressa, quia cera sine impressione non est sigillum.* The law has not indeed declared of what precise materials the wax shall consist; and whether it be a wafer, or any other paste or matter sufficiently tenacious to adhere and receive an impression, is perhaps not material." See also *Van Santwood v. Sandford*, 12 *John.*, 197.

By reference to the Revised Statutes, § 27 (sec. 29), and the Law of 1831, § 35, it will be seen that before an attachment can issue, the applicant must execute and deliver to the justice a bond with sufficient surety in the penalty, under the former law, of two hundred dollars, and under the latter, of at least one hundred dollars, conditioned to pay the defendant all damages and costs which he may sustain by reason of the issuance of such attachment, if the plaintiff fail to recover judgment thereon; and if such judgment be recovered, that such plaintiff will pay the defendant all moneys which shall be received by him from any property levied upon by such attachment over and above the amount of such judgment and interest, and costs thereon.

It will be noticed, that beside the costs of defending the attachment suit, the defendant is entitled to recover on the bond all damages that he may have sustained by the wrongful seizure and detention of his property. *Dunning v. Humphrey*, 24 *Wend.*, 31. The liability of a party for costs and damages extends to the final determination of the cause, though carried to the appellate courts.

The plaintiff in the attachment, binds himself to pay *all damages and costs* that the defendant may sustain by reason of its issuance, if he fail to recover judgment thereon. *Ball v. Gardner*, 21 *Wend.*, 270. The bond is further conditioned, that if the plaintiff recover judgment, he will pay the defendant whatever moneys he may receive from the property levied upon, in excess of the amount of such judgment, with the interest and costs.

The bond need not be signed by the plaintiff. The Revised Statutes expressly provide for its being executed by the applicant and surety; the language of the Non-imprisonment Act is, that it shall be executed by the plaintiff, or some one in his behalf, with surety. In the former case the *applicant* must execute; in the latter it may be by the *plaintiff* or *any other person*.

The signatures of the parties executing the bond, should be opposite the seals. The seals and the signatures should follow after the condition of the bond and not after the penal part of it, although in the case of *Reed v. Drake*, 7 *Wend.*, 345, where the obligor signed his name and affixed his seal in the space between the penal part of the bond and the condition thereof, it was held that the bond was valid. The facts in that case were, that mutual bonds, of which this was one, were executed and delivered by the parties on an agreement to arbitrate certain matters. The condition was, to abide by the award made and was written and read as a part of the instrument at the time of the execution and delivery; held, that the condition was as much a part of the instrument as if the signature had been at the foot of it. *See also, Williams v. Barnaman*, 19 *Abb.*, 69.

In the case of *Millins v. Shafer*, 3 *Denio*, 60, suit was commenced by attachment under the Law of 1831. A bond was given: "Know all men by these presents, that we, Jacob Shafer by Walter Shafer, his agent, and Russel G. Dorr and Walter Shafer, are held," &c., and was executed thus: "Walter Shafer, agent for Jacob Shafer [L. s.]; Walter Shafer [L. s.]; Russel G. Dorr [L. s.]" Held, "It was the bond of the agent, Walter Shafer, individually, and another person, given on behalf of the plaintiff, and as such satisfies the statute, although the plaintiff may not have been bound by it." It must be remembered that this decision was rendered in a case brought under the Law of

1831, which provides that the plaintiff or some one in his behalf, shall execute the bond.

The form of the bond, may be as follows :

Know all men by these presents, that we, Chas. H. Tefft, Jr. and Theodore M. Collier, are held and firmly bound unto Ambrose Hillman in the sum of * * * * hundred dollars, to be paid to the said Hillman, or to his certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 20th day of February, 1874.

Whereas, an application has been made by Wm. H. Brown in his favor (*or, in his favor as executor, administrator, &c., or, in favor of John Doe*), to James S. B. Scott, Esq., a justice of the peace of the town of Saratoga Springs in the county of Saratoga, for an attachment against the property of the said Ambrose Hillman, in pursuance of the provisions of the statutes of the State of New York, in such case made and provided :

Now, therefore, the condition of this obligation is such, that if the said Wm. H. Brown (*or, the said Wm. H. Brown as executor or administrator, &c., or, the said John Doe*), shall pay the said Ambrose Hillman, all damages and costs which he may sustain by reason of the issuance of said attachment, if the said Wm. H. Brown (*or, the said Wm. H. Brown as administrator or executor, &c., or, the said John Doe*), shall fail to recover judgment thereon ; and if such judgment be recovered and the said Wm. H. Brown (*or, the said Wm. H. Brown as administrator or executor, &c., or, the said John Doe*), shall pay the said Ambrose Hillman all moneys which shall be received by him from any property levied upon by such attachment, over and above the amount of such judgment and interest, and costs thereon, then this obligation to be void, otherwise of force.

CHAS. H. TEFFT, JR. [L. s.]

THEODORE M. COLLIER. [L. s.]

Sealed and delivered {
in presence of }

JAMES S. B. SCOTT,

I approve of Chas. H. Tefft, Jr., and Theodore M. Collier, as sureties in the foregoing (or, within) bond.

JAMES S. B. SCOTT,

February 20th, 1874.

Justice of the Peace.

A regular bond is indispensable to give the justice jurisdiction in all cases of attachment, whether under the Revised Statutes or the Law of 1831; and whether the defendant is a resident or a non-resident. *Taylor v. Heath*, 4 *Denio*, 592; *Davis v. Marshall*, 14 *Barb.*, 96; *Bennett v. Brown*, 4 *N. Y.*, 254; *S. C.*, 20 *N. Y.*, 99; *S. C.*, 31 *Barb.*, 158. The bond must be such as the statute requires. No agreement, nor promise to pay damages, &c., not even an advance of money, will satisfy the law. The statute is mandatory, not directory. *Homan v. Brinkerhoff*, 1 *Denio*, 184; *Kelly v. Archer*, 48 *Barb.*, 68.

By referring to the form given for a bond in attachment cases, it will be seen that the characters in which the parties stand, are particularly described. Such description is necessary, and its omission, or any essential misstatement thereof, will render the bond defective. *Comfort v. Gillespie*, 13 *Wend.*, 404.

The statute (*Vol. 3, 5th ed.*, 476, § 48 [*sec. 59*]) applicable to this subject is explicit, and reads as follows: "No sheriff or other officer shall take any bond, obligation or security, by color of his office, in any other case or manner than such as are provided by law; and any such bond, obligation or security, taken otherwise than is herein directed shall be void." See *Warner v. Racey*, 20 *John.*, 74; *Sloan v. Case*, 10 *Wend.*, 370; *Skellinger v. Yendes*, 12 *Wend.*, 306; *Barnard v. Viele*, 21 *Wend.*, 88.

The Law of 1831, requires the penalty of the bond to be in the sum of at least one hundred dollars. Under the Revised Statutes a penalty in the sum of two hundred dollars is required. The plain intent and meaning of the law is, that a bond should be taken which will secure the defendant from all damages and costs, both present and prospective.

It will be seen by reference to the form of the bond, that the sureties are mentioned in the body of it. This is the usual and legal form, although it has been held that an appeal-bond was valid where the name of the surety was not written in the body

of the instrument. It is enough in any contract, that the intent of the party clearly appear, though it be not expressed fully and particularly. The act of executing a bond expresses a full intent to be bound by its terms. This view of the case is not only reasonable, but is supported by authorities. *Ex parte Fulton*, 7 Cow., 484; *Decker v. Judson*, 16 N. Y., 439; *Williams v. Barnaman*, 19 Abb., 69.

The law does not absolutely require more than one surety on the bond. *Williams v. Barnaman*, 19 Abb., 69. But, whether there are one or more, the justice should be satisfied that they are perfectly responsible for the amount which may be required of them in case the plaintiff does not sustain his action. The magistrate should remember that the sureties may be called upon to pay not only the costs which may be rendered in the court below, but on appeal, and the damages arising in consequence of the attachment suit. The bond is conditioned that the sureties pay the defendant *all the damages and costs* which he may sustain by reason of the issuance of the attachment. The prospective costs and damages should be taken into account in determining the sufficiency of the sureties, for the measure of damages is not the mere taxable costs in the suit; the obligee may recover his *damages at large* for the seizure, detention and deterioration of his goods, &c., &c. *Cowen's Treatise*, Part 2, 998; *Dunning v. Humphrey*, 24 Wend., 30; *Ball v. Gardner*, 21 Wend., 270; *Bennett v. Brown*, 31 Barb., 158; S. C., 4 N. Y., 254; S. C., 20 N. Y., 99.

The approval of the sureties by the justice must be in writing upon the bond. *R. S.*, § 27 (*sec. 29.*)

The bond must be executed and delivered to the justice before an attachment can issue. This is necessary to give him jurisdiction; otherwise he would be a trespasser. An error in this regard cannot be cured by executing a bond after the warrant of attachment has been issued. "A justice cannot, by amending a proceeding in a particular which is necessary to give him jurisdiction, acquire an authority *nunc pro tunc.*" *Ackerman v. Finch*, 15 Wend., 652. But where a bond has been issued and such bond does not conform to the statute in all respects, "the same shall be deemed sufficient, if it conform thereto substantially, and does not

vary in any matter to the prejudice of the rights of the party to whom or for whose benefit such bond shall have been given." 3 *R. S.*, 5th ed., 870, § 35. And the court "may, on the application of all the obligors therein, amend the same in any respect, and such bond shall thereupon be deemed valid from the time of the execution thereof." 3 *R. S.*, 5th ed., 870, § 36.

It will be seen that the application to amend must be made by all the obligors; that is to say, by both principal and surety, or by all who have signed the instrument. The safest practice would be, for the justice to state in his minutes the application to amend, specifying the alterations proposed, and the names of the obligors who apply, with their consent and agreement to execute the bond as amended. *Shaw v. Lawrence*, 14 *How.*, 94; *Potter v. Baker*, 4 *Paige*, 290.

The justice has power to amend a clerical mistake, even under objection of the defendant. Where an attachment suit was commenced and on the return day the defendant appeared and objected that the amount of the debt was not stated in the attachment and prayed that the suit abate; and the justice instead of granting the motion amended by inserting the words "*fifty dollars*" as the sum sworn to, and then proceeded to hear the proofs of plaintiff (the defendant refusing further to appear), and rendered judgment in favor of plaintiff, held; that the amendment made by the justice was clearly such an one as it became his right and duty to make. He has power to amend clerical mistakes in process issued properly by him. *Near v. Van Alstyne*, 14 *Wend.*, 230. A justice's court possesses the same power to amend as courts of record, as appears from Revised Statutes, 5th edition, volume 3, page 426, section 1. *Brace v. Benson*, 10 *Wend.*, 213.

Where the plaintiff does not succeed in the attachment action, the defendant may bring an action on the attachment-bond, and recover all the damages and costs which he has sustained by reason of the issuance of the attachment. In one attachment action, the usual bond was given, and goods and chattels to the value of \$300, were attached, kept, and detained, for the space of sixty days, and subsequently the attachment suit was discontinued. The defendant brought suit on the bond, alleging that he had been subjected to great expense in his defense of the suit, and that the bondsmen

had neither paid damages nor costs. The bondsmen pleaded *non damnificatus* except as to ten dollars, and as to that, a tender before suit brought. It was held, that besides the costs of defending the attachment, the plaintiff was entitled to such damages as a jury might think he had sustained, by the wrongful seizure and detention of his property. If it was taken out of his possession, he should be entitled to the value of it; if seized and left in his possession, to such damages as might be awarded for the unlawful intermeddling with the property. *Dunning v. Humphrey*, 24 *Wend.*, 30. The plaintiff, however, is not entitled to recover the value of the property seized by virtue of the attachment, if he has not been dispossessed; and where it is not shown that he has been subjected to costs, he is entitled to only nominal damages. *Groat v. Gillespie*, 25 *Wend.*, 383; *S. P. Wilson v. Orcutt*, 11 *Paige*, 578. Where the property is wrongfully taken, the subsequent appropriation of it by a sale on execution in favor of the wrong-doer, will not save the party from answering in damages to the full value of the property. *Otis v. Jones*, 21 *Wend.*, 394.

Where property was seized and removed by virtue of an attachment, and the plaintiff, having been nonsuited on the trial, immediately sued out another attachment, upon which the officer who served the first, seized the same property, in his own possession on the second attachment, and afterwards sold it on the execution in that suit; in an action on the bond given on the issuance of the first attachment, held, that the defendants were entitled to show the appropriation of the property on the process in the second attachment suit, in reduction of damages. The plaintiff in the suit on the bond, sought to recover the value of the property attached—not the costs and damages for detention. *Earl v. Spooner*, 3 *Denio*, 246.

Where an attachment-suit for any cause is illegally commenced, thus rendering the process void, the defendant may either bring an action of trespass, or waive the wrong and take his remedy on the bond. So held, where in the case of a non-resident, the justice issued a long, instead of a short, attachment. See *Bowne v. Mellor*, 6 *Hill*, 496.

If the plaintiff in the attachment-suit does not succeed in obtaining judgment before the justice, the property attached must be

returned to the defendant, notwithstanding the plaintiff brings an appeal from the finding of the justice or jury. If the property is not returned, the defendant may bring trover, after demand, or replevin for the goods not returned. In the case of *Moore v. Somerindyke*, 1 *Hilt.*, 199, it is held, that it is the duty of the officer to take and hold the property to satisfy any judgment that may be recovered on the attachment; that as soon as it is established that no judgment can be recovered thereon in favor of the plaintiff, the right to retain the goods ceases, and the defendant in the attachment is entitled, upon demand, to have them restored to his possession.

The following is the form of attachment :

SARATOGA COUNTY, ss. :

The People of the State of New York, to any constable of said county, greeting : Whereas, Noah C. Vibbard (*or, Noah C. Vibbard as executor or administrator, &c.*) has made application to me, P. F. Allen, Esq., one of the justices of the peace of said county, for an attachment in his favor (*or, in his favor as executor, administrator, &c., or, in favor of John Doe*), against the property of Ambrose Hillman, according to the provisions of the statutes of the State of New York, in such case made and provided, for a debt of * * * * * dollars, being the amount sworn to by the applicant, which debt arose upon contract (*or, upon a judgment*), and the requisite proof by affidavit, and a bond with sufficient surety, duly approved by me, having been made, executed and delivered to me :

You are, therefore, commanded to attach so much of the goods and chattels of the said Ambrose Hillman (except such as are by law, exempt from execution), as will be sufficient to satisfy such debt, and safely to keep the same, in order to satisfy any judgment that may be recovered on this attachment. And do you make return of your proceedings hereon, to me, at my office in Ainsworth's Building in the town of Saratoga Springs in said county, on the 27th day of February, 1874, at 9 o'clock in the forenoon ; and have you then and there this precept. Given under my hand at the town aforesaid, the 20th day of February, 1874.

P. F. ALLEN,

Justice of the Peace.

SHORT ATTACHMENTS.

By the 33d section of the Law of 1831, the process of short attachment may issue, whenever, by the provisions of the 30th section of the same law, no warrant can issue, and the defendant resides out of the county ; and the same must be returnable not less than two, nor more than four days from the date thereof, and shall be served at least two days before the time of appearance mentioned therein ; and this section further declares, that if such defendant be proceeded against otherwise, the justice shall have no jurisdiction of the cause. There are not two kinds of attachment, as is sometimes supposed, but this section of the Non-imprisonment Act simply extends the *same attachment* provided for by statute, to *defendants residing out of the county*, and makes the time for the return of the process less than when the defendant is a resident. There are no new cases provided for, as in the following section (§ 34), but this section simply confers *additional powers* upon the justice : under its provisions he may issue an attachment returning the process not less than two nor more than four days from the date thereof, whenever it is shown that the defendant is a non-resident of the county. The provisions of this section apply to the time when the process shall be made returnable and served. The proceedings are identical, whether the attachment be a long or a short one, and whether it issues under the Revised Statutes or under the Non-imprisonment Act.

There must be both an affidavit and a bond, before a short attachment can issue. By the 26th section of the Revised Statutes, an affidavit is made a requisite for the issuance of an attachment : and by the 29th section of the same statute, a bond is made indispensable. The 43d section of the Non-imprisonment Act, declares that all the provisions of the Revised Statutes, which require proof to be made, and security to be given, before an attachment can legally issue, and which are not expressly repealed by said act, nor inconsistent with its provisions, shall be in full force, and shall apply to the provisions of said act to abolish imprisonment for debt, “so far as the same relate to proceedings in courts before justices of the peace.” Again, the 35th section of the Non-imprisonment Act, declares (in consistency with the above general provision) that the plaintiff, or some one in his behalf, shall also

execute in the "cases provided for by this act, a bond in the penalty of at least one hundred dollars," &c. It is plain, therefore, that an affidavit and a bond are a condition precedent to the power of issuing an attachment which the statute gives. *Taylor v. Heath*, 4 *Denio*, 592; *Bennett v. Brown*, 4 *N. Y.*, 254; *S. C.*, 20 *N. Y.*, 99; *Davis v. Marshall*, 14 *Barb.*, 96.

As regards the facts to be stated in the affidavit for a short attachment, the requirements are the same as for a long attachment. The provision of the Revised Statutes requiring proof of the grounds upon which the attachment is applied for, is not repealed, expressly or by implication, by the Non-imprisonment Act, nor is it inconsistent with anything contained in said act: the same statement of facts and circumstances as evidence of the fraudulent intent of the debtor in the disposition of his person or property, is, therefore, required by law before a short attachment can issue. And, in addition, the facts of the non-residence of the defendant and that he cannot be arrested by warrant, must be set forth. These are jurisdictional facts, and if the justice undertakes to act without proof of them, his acts are *coram non judice* and void. "A power to act, is the first thing to be shown by a court of limited and special jurisdiction." *Waters v. Whittamore*, 13 *Barb.*, 634; *Taylor v. Heath*, 4 *Denio*, 592; *Allen v. Stone*, 9 *Barb.*, 60. In the case of *Stevens v. Benton*, 39 *How.*, 13, the court say, "On the application to a justice of the peace for a short attachment under the Act of 1831, the affidavit should state not only that no warrant can issue against the defendant, but the facts or circumstances to show that the demand is such that under the act no warrant can be issued against him; because, in many cases of demand, a warrant may issue under the Act of 1831, although it arose on contract. If the affidavit does not show how the demand arose on contract, the justice cannot judge whether a warrant can issue or not." See *Rue v. Perry*, 63 *Barb.*, 40.

The following form of affidavit may be used :

SARATOGA COUNTY, ss. :

William H. Brown, being duly sworn, says, that Ambrose Hillman is justly indebted to this deponent on a demand arising upon contract, (*here state the nature of the demand, as, for instance,*

for work, labor and services,) (or, upon a judgment, and if so, describe the judgment fully,) in the sum of * * * * dollars, as near as this deponent can estimate the same, over and above all discounts which the said Hillman has against him; that the application for an attachment against the property of the said Hillman which accompanies this affidavit, is made on the ground (*here state the ground. See form of affidavit for long attachment.*)

And deponent further says, (*here state the facts and circumstances. See form of affidavit for long attachment.*)

And deponent further says, that the said Ambrose Hillman is a non-resident of the said county of Saratoga, and that the cause of action against the defendant is not for the collection of money by him as a public officer, nor for official misconduct or neglect of duty, nor for damages for misconduct or neglect in any professional employment.

And deponent further says, that he believes the acts so done by the said Hillman, were done with the intention of defrauding his creditors.

WM. H. BROWN.

Sworn and subscribed before me, this {
20th day of February, 1874. }

JAMES M. ANDREWS, JR.,
Justice of the Peace.

The application and bond are drawn the same as for a long attachment.

The form of a short attachment is the same as that of a long attachment, except that it must state that the defendant is a non-resident of the county, and must be made returnable not less than two nor more than four days from its date.

It is not material how the defendant becomes a non-resident—even if he absconds from one county into another and is there found—the proper process is a short attachment. Or if he is a non-resident of the State, such process may issue, although from the opinion of Chief-Justice Nelson, in the case of *Webber v. Gay*, 24 Wend., 485, another inference might be drawn: but that decision was founded upon the case of *Clark v. Luce*, 15 Wend., 479, which has since been overruled. Justice Bronson expressed some

doubt on this point, in his opinion in the case of *Dowd v. Stall*, 5 *Hill*, 186, which tended to sustain the opinion in *Webber v. Gay*, but the overruling of the opinion of Chief-Justice Nelson, by the Supreme Court, in the case of *Thompson v. Sayre*, 1 *Denio*, 175, settles the question, by holding, "that any person being a non-resident of the county (and a non-resident of the State comes within that description) *must*, when sued before a justice of the peace, be proceeded against by a *short summons* or *attachment*, and any other process would be irregular and void."

Where, under a short attachment, the defendant's property has been taken, but the officer has been unable to make personal service, &c., and the defendant does not appear upon the return day, a summons must issue and proceedings be had the same as in process by long attachment. *Conway v. Hitchins*, 9 *Barb.*, 378.

SERVICE AND RETURN OF PROCESS.

The statute requires that the constable to whom the attachment shall be directed and delivered, shall execute the same at least six days before the return day (*R. S.*, § 29 [*sec. 31*]): if it be a short attachment, it must be served at least two days before the time of appearance mentioned therein. *Law of 1831*, § 33.

The rule in regard to the computation of time from the date of the process to the return day, is to exclude the day of service and include the return day. *Bissell v. Bissell*, 11 *Barb.*, 96; *Judd v. Fulton*, 10 *Barb.*, 117; *Ex parte Dodge*, 7 *Cow.*, 147. The rule is well settled, that where days are mentioned in the statute, they are to be reckoned one exclusive and one inclusive. *Columbia Turnpike Road v. Haywood*, 10 *Wend.*, 422. Sundays are to be counted the same as other days. *King v. Dowdall*, 2 *Sanford*, 131. The law does not regard fractions of a day in computing the time for the service of process. *Ball v. Mander*, 19 *How.*, 468. "By the method of computing time in this State, established by the Revised Statutes, a day consists of twenty-four hours, and commences and ends at midnight." *Pulling v. The People*, 8 *Barb.*, 384.

In relation to the issuance or service of process on Sunday, election day or town meeting day, see pages 41 and 42.

The officer must attach the property of the defendant while it is within the county in which the justice, who issued the process,

resides, otherwise he will be a trespasser. Whenever the officer has once legally attached the property and had it in possession, he may follow it into any county within the State, and may retake it whenever it may be found. Under such circumstances he may maintain trover or trespass for its value, or damages for its detention. *Barker v. Miller*, 6 *John.*, 195 ; *Terwilliger v. Wheeler*, 35 *Barb.*, 620.

Section 29 (sec. 31) of the Revised Statutes, directs, in general terms, the manner of attaching property: the constable "shall attach, take into his custody and safely keep, such part of the goods and chattels of the defendant as shall not be exempt from execution, and as shall be sufficient to satisfy the demand of the plaintiff." The same property may be taken on an attachment as on an execution, and the same rule of exemption applies.

It is the duty of the officer to take sufficient goods and chattels of the defendant to satisfy the demand of the plaintiff. The sufficiency of the levy is left in a measure to the discretion of the officer, but that discretion must not be abused. The amount of goods attached must be reasonable, and for a malicious use of process, an action will lie. *Rogers v. Brewster*, 5 *John.*, 125. "The law will make most liberal intendment in favor of its ministerial officers, but will not permit them to resort to the *ultima ratio*, when the legitimate objects, which it is their duty to effect, can be accomplished by milder means." An officer should not show favor nor give unreasonable delay, nor be guilty of oppression, nor use more severity than is necessary. *McDonald v. Neilson*, 2 *Cow.*, 139, and cases there cited. While the officer must not be oppressive in his levy by taking such property from the defendant as will damage him materially in his business if other goods can be found of value sufficient to satisfy the attachment demand, yet he must be sure and take enough of the property of the defendant into his possession, to satisfy, beyond all doubt, the claim sworn to as due the plaintiff. In general, attachments are subject to the same rules as executions, with respect to the liability of officers making, and parties causing, levies. *Fairbanks v. Bloomfield*, 5 *Duer*, 434 ; *Kuhlman v. Orser*, 5 *Duer*, 242, 253 ; *Smith v. Orser*, 42 *N. Y.*, 432, affirming, 43 *Barb.*, 187.

Joint property may be taken under attachment against one of the joint owners, and his interest therein sold, such as the property

of partners and tenants in common. *Phillips v. Cook*, 24 *Wend.*, 389; *Woodell v. Cook*, 2 *Hill.* 47, and note to that case; *Wheeler v. McFarland*, 10 *Wend.*, 318; *Hergman v. Dettleback*, 11 *How.*, 46. If an attachment is obtained on a claim arising on contract, for the purchase price of specific personal property, such property may be attached, although under other circumstances it might be exempt from levy and sale. *Laws of 1842, chap. 157, p. 193.*

After the officer has attached the property of the defendant, the statute requires him immediately to make an inventory of the property seized, and if the defendant can be found in the county, to serve a copy of such attachment and inventory, certified by him, upon such defendant personally; if not so found, then a copy may be left at the last place of residence of the defendant; but if he have no last place of residence in the county where the goods and chattels are attached, such copy and inventory are to be left with the person in whose possession the goods and chattels were found. *Revised Statutes*, § 29 (*sec. 31*). *Law of 1831*, § 36. *Watts v. Willett*, 2 *Hilton*, 212.

The following may be used as a form for a certified copy of an attachment and inventory:

I hereby certify that the attached process is a true copy of an attachment issued by Lewis Wood, Esq., a justice of the peace of the town of Saratoga Springs, Saratoga county, on the 20th day of February, 1874; and I also certify that the following is a true copy of an inventory of the property seized by me by virtue of said attachment, this 20th day of February, 1874. (*Here enumerate all the articles attached, as for instance: One basket champagne; one barrel Glens' Fall ale; one pipe Swan gin; twenty boxes segars.*)

· GEORGE LANGDON,
Constable.

The officer should be careful to make the service as prescribed by statute, otherwise he will not have jurisdiction of the property of the defendant. Where a person was passing through a county other than that in which he resided, and a justice of that county issued an attachment against him, and the officer served a copy of

the attachment by leaving the same at a store where the defendant had been shortly before, it was held, that it was the duty of the constable to leave the copy at the dwelling-house, or other last place of abode of the defendant, and that it was absurd to consider the store where the defendant was for a few moments, his dwelling-house or last place of abode. *Dudley v. Staples*, 15 *Johns.*, 196.

If the defendant appear on the return day of the attachment, such appearance will confer jurisdiction on the justice so far as the person of the defendant is concerned, but not as to the property, where the attachment has not been served in the manner required by the statute. *Watts v. Willett*, 2 *Hilton*, 212.

The constable is responsible for the safety of the property he has attached; he is considered in the light of a bailee, and accountable for ordinary negligence. He is, therefore, to provide for its safe keeping, though if it is lost or destroyed without his neglect, he is not accountable.

After seizure of the goods by attachment, their removal may be stayed, if a bond be given to the constable by any person, with sufficient surety, to be approved by him, in a penalty *double the sum stated in the attachment to have been sworn to by the plaintiff*, conditioned, that such goods and chattels shall be produced, to satisfy any execution that may be issued upon any judgment obtained by the plaintiff upon such attachment, within six months after the date of such bond. § 30 (sec. 32.) The penalty—double the sum sworn to by the plaintiff; and the condition—that such goods and chattels shall be produced, &c., must be clearly stated, as provided by statute, or the bond will be of no effect.

It is further provided by section 31 (sec. 33) of the statute, that any person may, after seizure of property by attachment and before execution issues upon the judgment obtained thereon, claim such property as his own, and it shall be delivered to him, if he execute a bond to the plaintiff, with sureties approved by the constable or justice who issued the attachment, in the penalty of *double the value of the property attached*, with a condition, that in a suit to be brought within three months on said bond, he will establish that he was the owner of such property at the time of such seizure, or pay the value of such property with interest.

It will be noticed, in regard to the bonds which are thus authorized to be executed, and upon the execution of which the property

attached is to be delivered up (*R. S.* § 32 [sec. 34]), that in the first case the bond is to be to the *constable*, and in the last to the *plaintiff*. In the former case, also, the bond is to be "with sufficient *surety*;" in the latter, "with *sureties*." In the latter case, therefore, at least two sureties should sign the bond. The constable has a discretion to exercise, as to the sufficiency of the security to be taken, and will undoubtedly be protected if he exercise it in good faith. If he be unacquainted with the responsibility of the sureties, or doubt their sufficiency, he should, for the purpose of ascertaining the fact, swear them as to the amount of property they may own over and above all debts and liabilities, and property exempt from execution (3 *R. S.*, 5th ed., 866, § 9); and if they prove insufficient, he cannot be held liable, for he has done all the law requires of him.

There can be no difficulty as to the amount of penalty to be inserted in the bond given to prevent the removal of goods attached: but to determine the amount to insert in the bond given by the claimant, the constable must ascertain the value of the property. The only way is for him to exercise his best judgment in this regard, and if he has no knowledge on the subject, he should inform himself from those familiar with the value of such articles as are attached.

The condition of the bond under the former statute, is, that the property shall be produced to answer any execution that may issue, &c., and the bond must conform to the statute in this regard, or it will be void. *Morange v. Edwards*, 1 *E. D. Smith*, 414. The condition of the bond given by the claimant, is, that upon a suit brought within three months from the date of the bond, he will establish that he was the owner of the goods at the time of the seizure, and if he fail to do so that he will pay their value with interest. The statute clearly contemplates protection to the real owner of the property as well as to the plaintiff in the attachment. *Kamena v. Wanner*, 6 *Duer*, 698.

The following is a form of bond to prevent the removal of goods attached:

Know all men by these presents, that we, Ambrose Hillman and Patrick McDonald, of the town of Saratoga Springs, county of

Saratoga, are held and firmly bound unto George Langdon, in the sum of * * * * * dollars (*double the sum stated in the attachment to have been sworn to by the plaintiff*), to be paid to the said George Langdon, or to his certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 20th day of February, 1874.

The condition of this obligation is such, that if certain goods and chattels, to wit: (*here enumerate all the articles attached*), which have been seized by the above named George Langdon, by virtue of an attachment issued by James S. B. Scott, Esq., in favor of Lorenzo L. Brintnall against the above bounden Ambrose Hillman, shall be produced to satisfy any execution that may be issued upon any judgment which shall be obtained by the plaintiff upon the said attachment, within six months after the date hereof, then this obligation to be void, otherwise of force.

AMBROSE HILLMAN. [L. s.]

PATRICK McDONALD. [L. s.]

Sealed and delivered in presence of

WILLIAM E. DEXTER.

The approval of the surety should be by the constable, and endorsed on the bond in the following form:

I approve of Patrick McDonald as surety in this bond.

GEORGE LANGDON,

Constable.

February 20th, 1874.

The following is a form of bond by claimant of property attached:

Know all men by these presents, that we, Charles H. Tefft, Jr., Noah C. Vibbard, and Vernon Todd, of the town of Saratoga Springs, county of Saratoga, are held and firmly bound unto

Lorenzo L. Brintnall, in the sum of * * * * dollars (*double the value of the property attached*), to be paid to the said Lorenzo L. Brintnall, or to his certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 20th day of February, 1874.

Whereas, certain goods and chattels to wit: (*here enumerate all the articles attached*), were, on this 20th day of February, 1874, seized by Frederick A. Johnson, constable, by virtue of an attachment issued by James M. Andrews, Jr., a justice of the peace of the town of Saratoga Springs, county of Saratoga, in favor of the above named Lorenzo L. Brintnall against Ambrose Hillman: and whereas, the above bounden Charles H. Tefft, Jr., claims the said goods and chattels as his property:

Now, therefore, the condition of this obligation is such, that if, in a suit to be brought on this obligation within three months from the date hereof, the said Charles H. Tefft, Jr., shall establish that he was the owner of the said goods and chattels at the time of the said seizure; and in case of his failure so to do, if the said Charles H. Tefft, Jr., shall pay the value of the said goods and chattels, with interest, then this obligation to be void, otherwise of force.

CHARLES H. TEFFT, JR.	[L. s.]
NOAH C. VIBBARD.	[L. s.]
VERNON TODD.	[L. s.]

Sealed and delivered in presence of

WALTER J. FONDA.

The approval of the sureties in this bond, is to be either by the constable or justice, and may be in the same form as in the next preceding bond.

Notwithstanding the provision of the statute authorizing a bond to prevent the removal of goods attached, the constable may, if no such bond be tendered, take a receipt for the future delivery of the goods, in the same manner as under a levy by virtue of an execution. In the case of *Harvey v. Lane*, 12 *Wend.*, 563, Judge Nelson says: "There is no valid objection to the taking of a receipt

by a constable for the delivery to him, at a future day, of property seized under an attachment. The statute requires that the constable shall attach, take into his custody, and safely keep, the goods; but it would be inconvenient, and often impracticable, for him personally to take the custody of property thus seized, and from necessity he must sometimes trust to others. When he does so, it is still *in his custody* by intendment of law and he is responsible for it in like manner, and to the same extent, as though he had it in his actual possession. There is nothing in the statute inhibiting the use of a receptor, and convenience, and in many instances, necessity, require that the practice should be sustained."

While a receipt may be taken by the officer for the return of the goods seized, this does not relieve him from liability for their loss or damage. He must judge at his own peril as to the responsibility of the parties to whom he may deliver them. If they prove insolvent, by which the property fails to be applied to the creditor's debt, it is the misfortune of the officer who consented to trust them, instead of keeping the goods in his own hands, or requiring better security. *The People v. Reeder*, 25 N. Y., 302.

The taking of a bond by the constable does not destroy the lien of the attachment, neither does it take from the constable his liability in respect to the attached property. *Van Loan v. Kline*, 10 John., 129; *Sterling v. Welcome*, 20 Wend., 238.

If the bond given by the defendant is violated, the constable may bring an action on such bond, or he may assign it like any other bond and the assignee may bring the action. *Morange v. Edwards*, 1 E. D. Smith, 414.

In an action upon the bond of a claimant, he must, in order to establish his claim, prove that at the time of the seizure by the officer under the attachment, he was the general owner of the property attached—the owner in the sense contemplated by statute. *Pierce v. Kingsmill*, 25 Barb., 631.

If no bond is taken by the justice on the application for the attachment, it will be a good defense in an action on a bond given by a claimant as owner. The justice having acted without jurisdiction, all process is void and the plaintiff a trespasser. *Homan v. Brinkerhoff*, 1 Denio, 184. It is otherwise, where, on the voluntary appearance of the parties on the return day, the defendant pleading the general issue, judgment is rendered, execution issued,

and levy made by virtue of such execution, upon the property mentioned in said bond. In such case, the justice obtains jurisdiction by the appearance and plea of the defendant, and the levy is made by virtue of a valid judgment. *Id.*

To entitle a plaintiff to recover in an action on such bond, it is necessary for him to show only the execution of the bond by the defendants, and the value of the goods seized and delivered to the claimant. It is not necessary for him to show that the attachment was regularly issued. *Whiley v. Sherman*, 3 Denio, 185.

As has been said, the condition of the bond given by the claimant, is, that in case he fails to prove that he was the owner of the property attached, he shall pay the *value of the same*, together with the interest thereon. This would seem to be the stipulated damages on the part of the claimant, on failure to show that he was the owner. The measure of damages would then be, what was shown to be, by competent testimony, the value of the property claimed, and the interest. As this bond is given, not only for the protection of the attachment creditor, but also for the one having the real title to the property, judgment must be given if against the defendants, for the full value of the property claimed, notwithstanding the attachment creditor may not have obtained judgment, for more than one-half its value. If there is a surplus after paying the attachment creditor, he must pay it to the attachment defendant, or a suit may be brought upon the bond given by the plaintiff, on application for the attachment. The plaintiff should see to it that he prove the property delivered on the bond, up to its real value, for if it can be shown that he knowingly or by collusion, neglected so to do, there can be no doubt he will be liable to the attachment defendant for any loss sustained by him through such neglect. If the defendant in the attachment proceedings choose, he may pay the claim of the plaintiff, together with costs, and then bring an action on the bond given by the claimant and his sureties.

The next duty of the constable, after having executed the attachment, and either removed or secured the goods where they are, or taken the requisite bond or receipt for their production, is to make a return of the attachment at the day therein named for that purpose, with all his proceedings thereon, in writing, subscribed by him, with a copy of the inventory of the goods attached,

certified by him, and with any security he may have taken, pursuant to the provisions of the statute. And in addition, such return should state specifically whether the service upon the defendant was, or was not, personally made. *Law of 1831*, § 36. *Cook v. McDoel*, 3 *Denio*, 317; *Watts v. Willett*, 2 *Hilton*, 212. The object of this is, to enable the justice to learn from the return itself, whether or no the attachment and inventory had been personally served, so as to govern the future proceedings in the cause and the effect to be given to the judgment. *Rosenfield v. Howard*, 15 *Barb.*, 546. This is apparent from the provisions contained in other sections of the law. It is provided, if the attachment issues under the Law of 1831, and it appear that the service was personal, then no summons need be issued, and the judgment will be conclusive in all future proceedings: but if served by copy, then a summons must issue; and if that is not personally served, then the judgment rendered will be presumptive evidence only, of an indebtedness and may be repelled. *Law of 1831*, §§ 37, 38, 39. *Rosenfield v. Howard*, 15 *Barb.*, 546.

The following may be used as a general form of return to an attachment:

By virtue of the within attachment, I did, on the 19th day of February, 1874, attach, and take into my custody, the goods and chattels of the defendant therein, mentioned in an inventory of which the annexed is a copy; and immediately, on the same day, I made an inventory of the property seized, and served a copy of the within attachment and of the said inventory, duly certified by me, on the defendant personally; *or* (if the attachment is not personally served), and immediately, on the same day, I made an inventory of the property seized, and being unable to find the defendant in the county of Saratoga, I left a copy of the within attachment and of the said inventory, duly certified by me, at the last place of residence of the said defendant; *or* (if the defendant has no place of residence in the county, substitute for the last clause), with Timothy Holmes, in whose possession I found the said goods and chattels, the said defendant having no place of residence in the county of Saratoga.

JASPER SMITH,
Constable.

February 20th, 1874.

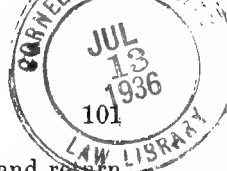
If a bond be given by the defendant or by one claiming the property as owner, the constable should add to his return the following :

But the said goods and chattels were delivered to Ambrose Hillman, defendant, (*or* to William Haeslip, claimant,) upon receiving the bond herewith returned.

When the attachment issues under the Law of 1831, and the defendant's property has been attached, but no personal service of the attachment and inventory has been made, and there is no appearance of the defendant, a summons may issue, upon the return of which, personally served, or "that the defendant cannot be found after diligent inquiry," the justice shall proceed to hear the cause. *Law of 1831, § 38.* If, however, the attachment issues under the provisions of the Revised Statutes, and the defendant's property has been seized, but no personal service of copies of the attachment and inventory has been made, but copies have been left at his last place of residence, the justice may proceed on the return day, and no summons need be issued. *Stewart v. Brown, 16 Barb., 367. R. S., § 29 (sec. 31).* No summons should in any case issue, where there has been personal service and seizure made, nor where the defendant appears on the return day. The statute prescribes no form for this summons, neither does it state what time may intervene between the date and return. In the absence of any provision on this subject, the ordinary form for a summons should be used, and it is probable that the time between the date and return should be regulated by the character of the attachment which precedes it; if a long attachment, the summons should be made returnable in not less than six, nor more than twelve days from date; if a short attachment, in not less than two, nor more than four days from date. *Cowen's Treatise, Part I, 523.*

The following form may be used as a return to such summons :

I hereby certify and return, that the within summons was personally served on the within named defendant at the village of Saratoga Springs, county of Saratoga, on the 20th day of Febru-



ary, 1874; *or*, (if defendant cannot be found) I certify and return that I have made diligent inquiry and search in the county of Saratoga for the defendant within named, and that he cannot be found within said county.

GEORGE LANGDON,

Dated *Feb. 23d*, 1874.

Constable.

The return is the evidence upon which the statute authorizes and requires the justice to proceed. He obtains jurisdiction by virtue of it, and the judgment which may subsequently be rendered, will protect the magistrate, the party, and the officer, who may be instrumental in enforcing it. *Putnam v. Man*, 3 *Wend.*, 202.

The above case also holds that the return of the constable is conclusive upon the defendant, so far as the proceedings in that suit are concerned, and that the truth of it cannot be traversed by a plea in abatement, or otherwise. This doctrine is questioned, however, in the case of *Van Rensselaer v. Chadwick*, 7 *How.*, 297, in which Justice Parker says, the point in the former case, was, whether trespass or case was the proper action for redress, and the court held the only remedy to be case for the false return. He adds: "I cannot agree to the proposition that a return of a sheriff or an affidavit of a person acting in his place, is conclusive upon the defendant, and can only be questioned in an action for a false return." Justice Strong, in the case of *Wheeler v. N. Y. & H. R. R. Co.*, 24 *Barb.*, 414, says: "I am not aware of any case where it has been decided that a defendant who appeared in season could not raise, and avail himself of, the objection that the primary process had not been served in such manner as to confer jurisdiction upon the magistrate, *See also Fitch v. Devlin*, 15 *Barb.*, 47. The return of an officer to process, is a jurisdictional fact, and may be controverted in the court below or on appeal. If pleas in abatement in justices' courts are abolished by the Code, all jurisdictional facts not appearing on the face of the process or the papers authorizing its issuance, should be taken advantage of by answer. An allegation controverting the return of the officer, cannot be sustained without proof, and, as a defense, the testimony to sustain such allegation cannot be introduced until the defendant

reaches his side of the case. Unlike a court of record, motions based on affidavits, cannot be heard in a justice's court. *Van Rensselaer v. Chadwick*, 7 *How.*, 297; *Sweet v. Tuttle*, 14 *N. Y.*, 465; *Gardner v. Clark*, 21 *N. Y.*, 399.

If the constable should return falsely, an action would lie against him at the suit of the party injured (*Id*; *Case v. Redfield*, 7 *Wend.*, 398; *Wheeler v. Lampman*, 14 *John.*, 481); and should he do so willfully and corruptly, he might also be indicted for a misdemeanor. 3 *R. S.*, 5th ed., p. 979, § 53 (sec. 38).

A question has arisen, as to the effect an appeal has upon the the possession of property attached by an officer, and his duty when it is certified to him that an appeal has been perfected. In the case of *Keyser v. Waterbury* 7 *Barb.*, 650, decided at the Saratoga term in 1850, Justice Hand, delivering the opinion of the court, held, that where property was taken upon an attachment issued by a justice of the peace, the officer should release the same upon being served with the requisite papers showing that an appeal had been taken from the judgment of the justice, in the same manner as if the property had been seized by him upon an execution. In 1854 the court of common pleas of the county of New York, decided that the appeal and the giving of the prescribed undertaking, and service of the copy thereof, have the effect to arrest the proceedings on the judgment below and on the execution, if any has been issued, and to suspend further action under the same until such appeal is disposed of; and it does not discharge a levy previously made and make it the duty of the officer to return the property to the hands of the defendant in the execution. *Smith v. Alien*, 2 *E. D. Smith*, 259. In 1857, the New York General Term decided, *In the matter of John Berry*, 26 *Barb.*, 55, that the appeal and security have no retrospective effect; they do not undo anything already done, or take away any lien once created. They only stay an execution if it has not issued, or its further execution if it has issued; so that if issued and a levy made, the sale under the levy is stayed, but the levy is not interfered with. Whatever rights or liens were acquired, are treated as if they were vested rights, not to be superseded by personal security, but suspended only, until the decision of the appellate court. In the case of *Rathbone v. Morris*, 9 *Abb.*, 213, Justice Ingraham sustains this decision.

REPORTED CASES.

SUPREME COURT.

LINNELL & FOOT v. SUTHERLAND.

(11 *Wend.*, 568. *Decided* 1834.)

When a suit is brought in a *justice's court*, in the names of two plaintiffs, an affidavit that one of the plaintiffs is a *non-resident* of the county, is not sufficient to authorize the issuing of a *warrant*.

If a demand belongs to the non-resident plaintiff *solely*, by assignment, such assignment should be shown.

It seems that a *warrant* may be issued when the *real* plaintiff is a non-resident, although the *nominal* plaintiff is a resident of the county in which the process issues.

In a suit by a *mechanic* for work done in the line of his business, after proof of one or two items of his account, the production of his *books of account*, with proof that he keeps fair and honest books, is *competent* evidence.

ERROR from Monroe common pleas. Sutherland was arrested on a *warrant* issued by a justice of the peace of the county of Monroe, at the suit of Elijah Linnell and Alvin Foot on an affidavit made by one James Linnell, that Elijah Linnell had a debt against Ebenezer Sutherland, and that *Elijah Linnell*, was a *non-resident* of the county of Monroe. On being brought before the justice, the defendant inquired upon what grounds the warrant had been issued, and was informed by the justice that it had been proved that the debt belonged to Elijah Linnell; that he was a non-resident of the county of Monroe; that bail had been put in for the costs, and that *Foot* was a *nominal* plaintiff. The plaintiffs then declared in *assumpsit* on the common counts and the defendant pleaded the general issue, and the cause was tried. It was proved that the plaintiffs were partners in the shoe-making business and an account was exhibited against the defendant for boots, shoes, and mending of boots and shoes, amounting to \$11.53. The delivery of one pair of shoes at the price of \$1.50, and the mending of another pair at $\frac{50}{100}$ were proved. The books of account of the plaintiffs were then produced, and it was proved by two witnesses that they had dealt and settled with the plaintiffs, and that they kept fair and honest books, and that during the time the account against the defendant accrued the plaintiffs had no clerk.

The justice rendered judgment for the plaintiffs for \$11.53 and the costs of the suit. The defendant removed the cause by certiorari into the Monroe common pleas, where the judgment of the justice was *reversed*. The plaintiffs sued out a writ of error.

E. Goss, for the plaintiffs in error.

M. F. Delano, for the defendant in error. ;

By the Court, SAVAGE, Ch. J. The warrant issued irregularly. There is no evidence showing where the plaintiff *Foot* resided. The statute, 2 Revised Statutes, 228 § 17, authorizes a *warrant* where the plaintiff is a *non-resident*, and tenders to the justice security for the payment of any sum which may be adjudged against him in the suit. The 19th section requires that an affidavit shall be made, stating the facts and circumstances, showing the grounds of the application whereby the justice may the better judge of the necessity and propriety of issuing the warrant. The affidavit, in this case, may be perfectly true, and yet not enough is shown to authorize the issuing of a warrant. Linnell and Foot were partners; the affidavit states that Linnell had a debt against Sutherland and that he is a non-resident of the county of Monroe. The affidavit is true, supposing the debt to be a partnership debt. The assignment, if important, should have been shown. In a justice's court, a summons is the regular process, and a warrant is not allowed by the Revised Statutes as the first process, only in four cases: 1. When the defendant is a non-resident; 2. When the plaintiff is a non-resident and gives security; 3. When the defendant is about to depart and not to return; 4. When the plaintiff is in danger of losing his debt unless a warrant issues. It is also allowed by the act of 1831, where the defendant has fraudulently disposed of his property, to defraud his creditors, or is about to do so. The reason of issuing a warrant in all these cases is to favor plaintiffs in facilitating the collection of their demands. When issued in favor of a non-resident plaintiff, the only reason for the statute is, that the plaintiff's attendance is necessary, and as he is supposed to be absent from home, the law will not require him to wait six days; and as his person and property are supposed to be without the reach of the process of the court, he is required to give security. This con-

sideration operates whenever the *real* plaintiff is non-resident, although the *nominal* plaintiff is a resident. The objection to giving the statute this liberal construction is, that it may be abused by making collusive assignments to non-residents, and thus harassing the defendants unnecessarily. To this, however, it may be answered that the fact of such collusive assignment being shown, the plaintiff must fail. Whether the resident plaintiff would be liable for costs after assignment, is not material; probably without notice to the defendant of his want of interest and agency in the prosecution, he would be thus liable; and there is no doubt of the liability of the assignee. But if the statute gives the warrant, as I have supposed, for the accommodation of the non-resident plaintiff, then the inquiry must be, whether the party in interest is non-resident; according to this view of the statute, it should have been shown in the affidavit that *Linnell* was the *sole* owner of the demand.

As to the second point, arising upon the return of the justice, the evidence given was competent; whether it was sufficient, is not a question for us, upon a writ of error.

Judgment of common pleas affirmed, with single costs.

SUPREME COURT.

BRACE AND OTHERS v. BENSEN.

(10 *Wend.*, 213. *Decided* 1833.)

Mesne process in a justice's court is amendable in the name of one of several plaintiffs; and it was accordingly held in this case that a summons at the suit of several plaintiffs might be amended after the return of the same, by altering the christian name of one of the plaintiffs from *Joseph* to *Jasper*.

ERROR from the Madison common pleas. Brace and twenty others as plaintiffs, commenced a suit before a justice of the peace, against Bensen, by summons. In the summons one of the plaintiffs was named *Joseph S. Keeler*. On the return of the process the parties appeared, and the plaintiffs by their counsel moved the justice that the summons be amended, by striking out the word *Joseph* in the name of Joseph S. Keeler, and inserting in lieu

thereof the word *Jasper*, so as to make the same conform to a written request for process delivered to the justice before the issuing of the summons; which motion was opposed by counsel. The justice decided in favor of the amendment, and altered the summons by inserting the name *Jasper*, instead of *Joseph*. Whereupon the plaintiffs declared, and subsequently judgment was rendered in their favor. The defendant sued out a *certiorari*, removing the judgment into the Madison common pleas, which court reversed the judgment. Whereupon the plaintiffs sued out a writ of error.

M. T. Reynolds, for the plaintiffs in error.

J. A. Spencer, for the defendant in error.

By the Court, SAVAGE, CH. J. The only question is whether mesne process is amendable in the name of the plaintiff in such process, and whether such amendment may be made in a *justice's court*. It has been decided in this court that mesne process is not amendable when tested or returnable out of term. 4 *Cow.*, 49, 504. It has been amended when returnable at a wrong place, 1 *Cowen*, 141; and where the name of a wrong person was inserted as chief justice. 1 *Cowen*, 203. Amendments have been granted by inserting a different person as defendant from the one named in the writ; but not different from the one served with process. 7 *Taunt.*, 295. So the name of the defendant has been amended where there was but one defendant, it appearing that the right name was contained in an affidavit to hold to bail. 2 *Bos. & Pul.*, 109. This was granted after the service of the process, the mistake being merely clerical. The same thing was since done in *Mestam v. Hurtz*, 3 *Maule & Sel.*, 450, after a plea of misnomer in abatement. In this case, Le Blance says there is no difference between amending the name and any other part of the declaration. The only doubt in that case arose from the fact that the suit was a penal action; but that, it was said, made no difference; it was the same as a civil suit. See *Cowen's Treatise*, 694, 5. The language of the Revised Statutes is broad: "The court in which any action shall be pending, shall have power to amend any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time

before judgment rendered therein." 2 *R. S.*, 424, § 1. The seventh section provides that *after verdict*, judgment shall not be stayed for a variety of defects in process, pleadings and proceedings; among them is a mistake in the name of any party. It is a general rule that any matter which is *cured by verdict*, is amendable before verdict. There is no question, therefore, that this matter was amendable; and that a justice's court possesses the same power as to amendments, as courts of record, appears from 2 *R. S.*, 225, § 1. "Every justice of the peace elected in any town of this State, or appointed for any city in which special courts are not established by law, is hereby authorized to hold a court for the trial of all actions in the next section enumerated, and to hear, try and determine the same according to law and equity; and for that purpose, where no special provision is otherwise made by law, such court shall be vested with all the necessary powers which are possessed by courts of record in this State."

I am clearly of opinion that the justice had the power of amendment and exercised it discreetly. Consequently the common pleas erred in reversing his judgment.

Judgment of Madison common pleas reversed, with single costs.

SUPREME COURT.

SMITH v. WEED.

(20 *Wend.*, 184. *Decided Oct.* 1838.)

The release of a *lien* obtained by the suing out of an attachment, is a good consideration for the promise of a third person to pay the debt of the party proceeded against by such process.

The powers of a justice to issue an *attachment* as conferred by the Revised Statutes, are not abridged by the act to abolish imprisonment; on the contrary, they are enlarged and extended to new cases, differing however, from the Revised Statutes as to the amount of indebtedness. The only operation of the act of 1831 on the Revised Statutes, is to dispense with the affidavit of *witnesses* as to the preliminary proof, and to declare the affidavit of the *plaintiff* sufficient to authorize the issuing of the process.

THIS was an action of *assumpsit*, tried at the Herkimer circuit in May, 1837, before the Hon. John Willard, one of the circuit judges. The plaintiff having sued out an *attachment*, issued by a justice of the peace of the county of Montgomery, against the goods and chattels of one John S. Joslin, by virtue of which a levy was made upon a quantity of *quarried stone* as the property of Joslin, the defendant promised that if the stone was the property of Joslin, and the plaintiff would discharge his *lien* upon the same and discontinue further proceedings upon the attachment, he would pay the *debt* due to him from Joslin. The amount of Joslin's indebtedness to the plaintiff, was \$131, and the stone was proved to be his property. The plaintiff alleged on the declaration, that the attachment was sued out under the statute entitled "Of courts held by justices of the peace." 2 Revised Statutes, 224. The justice who issued the attachment testified that the *application* for the process, the *affidavit* of the applicant, and the *attachment* were lost, but that the process was issued upon the affidavit of the plaintiff *alone*, and the ground of the application was, that Joslin had *departed from the county* where he last resided, *with intent to defraud his creditors*. He further stated that a bond was given with approved sureties, and produced the same, which was in the form prescribed by the Revised Statutes. A copy of the attachment was tested on the *tenth*, and returnable on the *nineteenth* day of August, 1835, was read in evidence. The defendant moved for a non-suit on the ground of variance between the declaration and proof; that in the declaration, it was alleged that the attachment was issued under the provisions of the *Revised Statutes*, whereas the proof showed that the process was issued partly under the Revised Statutes, and partly under the *act to abolish imprisonment*. *Statutes, Sess. of 1831, p. 403, §§ 33, 34*. He also insisted that the attachment was *void*, because, 1st. It could not legally issue for a demand exceeding \$50; and 2d. The defendant in the attachment being a *non-resident* of Montgomery, not more than *four* days should have intervened between the test and the return of the process; and that the attachment being void, the promise of the defendant was without consideration, and for that cause, the plaintiff was not entitled to recover. The judge overruled the motion for a non-suit, and charged the jury that the plaintiff was entitled to their verdict for the amount of his debt

against Joslin. The jury found accordingly, and the defendant now moves to set aside the verdict.

C. Tracy, for the defendant.

J. A. Spencer, for the plaintiff.

By the Court, NELSON, Ch. J. The attachment appears to have been regularly issued under the provisions of 2 *R. S.*, 230, § 26, *et seq.*, as amended in respect to the preliminary proof by the act of 1831, to abolish imprisonment for debt, *Statutes, Sess. of 1831, p. 404*, § 35, for a sum not exceeding \$100, upon the ground that the defendant in that process (Joslin) had absconded from the county with the intent to defraud his creditors. The authority given to a justice by the Revised Statutes to issue an attachment, was not abridged by the 34th section of the act of 1831, but on the contrary was extended to the other cases, viz., the fraudulent *removal, assignment or secretion* of property, limiting however, the amount to *fifty dollars*. The Revised Statutes are left untouched except in respect to the affidavit of the facts and circumstances on which the application is made, which by the 35th section may now be made by the plaintiff himself, instead of being made by two disinterested witnesses. The judge was clearly right in ruling that the stone attached belonged to *Joslin*, the defendant in the process; that the *lien* was valid, and that the release thereof constituted a good consideration for the undertaking of the defendant to pay the debt due to the plaintiff. 5 *Taunt.*, 450, 2 *East*, 332; 4 *Taunt.*, 117; 2 *Saund. on Pl. and Ev.* 547. Whether the agreement was intended to embrace the whole demand due, \$131, or only \$100, the extent of the lien, is matter of construction. The judge at the circuit took the former view of it from the language used by the witnesses, and I am inclined to think he was correct. The testimony of one of the witnesses is, that the defendant promised to pay the *debt of Joslin*, if the plaintiff would release the attachment; this may fairly exclude the whole, as the amount of the debt must have been well known at the time.

New trial denied.

SUPREME COURT.

BUTLER v. POTTER.

(17 John., 145. Decided 1819.)

Where a justice has no jurisdiction whatever, and undertakes to act, his acts are *coram non judice* and void; but if he has jurisdiction, and errs in the exercise of it, his acts are voidable only. As where a justice of the peace, in a cause before him, and of which he has legal cognizance, gave judgment for the plaintiff, for *more than five dollars costs*, besides damages, contrary to the statute, which limits the whole amount of *costs* to be recovered, to the sum of *five dollars*, the judgment and execution thereon were held to be voidable only; and that, therefore, the justice was not liable in an action of *trespass*, &c., and false imprisonment, at the suit of the defendant, who had been imprisoned under the execution issued on the judgment.

IN error, to the Court of common pleas of Onondaga county.

The plaintiff below brought an action of trespass, assault and battery, and false imprisonment, against the defendant below, who pleaded the general issue, with notice of justification, to wit, that the plaintiff and one Tappin, on the 26th of June, 1817, confessed a judgment before the defendant, as a justice of the peace, under the act for the recovery of debts to the value of \$25, upon which judgment execution was issued in favor of the plaintiff in that suit; and by virtue of which execution, the constable to whom it was directed, committed the plaintiff to gaol, which was the same trespass, assault, &c., mentioned in the plaintiff's declaration, &c.

On the trial of the cause in the court below, the execution issued by the defendant, as justice of the peace, against the plaintiff and Tappin, was produced in evidence, from which it appeared that the judgment was rendered, for sixteen dollars damages, and *five dollars and eighteen cents costs*; and the plaintiff proved that he was committed to gaol on the execution.

The counsel for the plaintiff below then objected, that inasmuch as it appeared, by the judgment and execution, that the *costs* were more than *five dollars*, it was contrary to the provision of the 26th section of the twenty-five dollar act; and the execution was, therefore, void, and no justification to the defendant. The court below decided that the execution was void, and directed the jury to find a verdict for the plaintiff; and the jury, accordingly, found a verdict for Potter, the plaintiff below, against Butler, for twenty-five

dollars and fifty cents damages ; and the defendant below tendered a bill of exceptions to the opinion of the court, on which the writ of error was brought.

The cause, on the return to the writ of error, was submitted to the court without argument.

Per Curiam. The justice had jurisdiction to give judgment for costs ; and though he was limited as to the amount, and gave judgment for more than he ought, it was an erroneous, not a void judgment. The case of *Prigg v. Adams* (2 *Salk.*, 674), is in point. There, an action of trespass and false imprisonment was brought, and the defendant justified under a *ca. sa.*, on a judgment in the Common Pleas, for five shillings, on a cause of action arising in Bristol. The plaintiff replied, setting out an act of parliament for erecting a court of conscience in Bristol, enacting, that if any person bring such action in any of the courts at Westminster, and it appeared, on trial, to be under *forty shillings*, that no judgment should be entered for the plaintiff ; and if it be entered, then, that it should be void. The court held the judgment voidable only, by plea or writ of error. We have decided, that where a justice has jurisdiction to issue an attachment, but proceeds erroneously in doing so, he is not, therefore, a trespasser. The distinction is this : where the justice has no jurisdiction whatever, and undertakes to act, his acts are *coram non judice* ; but if he has jurisdiction, and errs in exercising it, then the act is not void, but voidable only.

Judgment reversed.

SUPREME COURT.

BENNET *v.* RATHBUN.(17 *John.*, 37. *Decided* 1819.)

Where an action of trespass, *quare clausum fregit*, is commenced before a justice of the peace, and the defendant puts in a plea of *title* in the *locus in quo*, and the plaintiff then commences his action for the same trespass in the court of C. P. of the county in which the trespass was committed, which the defendant by writ of *habeas corpus*, removes into this court and the plaintiff on the trial, recovers *damages*, he is entitled to *double costs*, under the 7th section of the act of the 5th of April, 1813, (Sess. 36, ch. 53, 1 N. R. L., 390,) it being considered after the removal to this court, as the same action originally commenced in the court below.

THIS was an action of trespass, *quare clausum fregit*, originally commenced before a justice of the peace, in which the defendant pleaded *title* to the *locus in quo*. The plaintiff then commenced his action in the Court of C. P. of Otsego county for the same trespass; and the defendant removed the cause by *habeas corpus*, to this court, and it was tried at the Otsego Circuit, where a verdict was found for the plaintiff, for five dollars damages.

Brown, for the plaintiff, moved for double costs, under the act, sess. 36, ch. 53, § 7, (1 N. R. L., 390.) (*See R. S.*, vol. 2, pp. 225, 226.)

Campbell, contra.

Per Curiam. The 7th section of the act for the recovery of debts to the value of twenty-five dollars, provides, that where an action of trespass on land is brought before a justice of the peace, and the defendant puts in a plea of title, it shall be reduced to writing, &c., and the plaintiff may then bring his action in the court of C. P. of the county; "and if such plaintiff shall recover *any damages* in such action, the defendant shall be liable to pay to such plaintiff *double costs*." Although the cause be removed into this court by *habeas corpus*, it is still the same action, and the plea of title put in before the justice, will, on the trial of the cause, be conclusive evidence that the defendant relied on his title. A different

construction would lead to great injustice; for unless we consider it as a continuance of the same action from the court below, the plaintiff could not recover even single costs, unless the title actually came in question. We are of opinion, that the plaintiff is entitled to double costs.

Motion granted.

SUPREME COURT.

COLUMBIA TURNPIKE ROAD v. HAYWOOD.

(10 *Wend.*, 422. *Decided* 1833.)

This court has not the power to *reverse* the judgment of a common pleas court, *reversing* the judgment of a justice's court *on the merits*.

A summons in a justice's court, returnable in the *forenoon* of the *eighth day* of a month, is well served in the *afternoon* of the *second day* of the same month.

Fractions of a day in the service of process, notices or pleadings, are not regarded in the computation of time.

The rule requiring *notices of trial* to be served 14 days *before* the first day of the court, excluding from the computation of time the first day of court, confirmed.

A plaintiff who, after a decision on a *plea in abatement* in his favor in a justice's court upon an *issue of fact*, proceeds to adduce testimony on the merits as if an issue in fact had originally been joined, is estopped from saying that he was *entitled to judgment* on the determination of the plea in abatement against his adversary.

ERROR from the Columbia common pleas. The Columbia Turnpike Company sued Haywood in the *justice's court* of the city of Hudson, claiming from him a penalty of \$25, for forcibly or fraudulently passing a toll-gate of the company without paying the legal toll. The defendant was served with a *summons*, and on the return thereof the parties appeared, the plaintiffs declared, and the defendant put in a plea of the general issue; it being, however, agreed that the pleadings might be altered, if either party required it. The cause was adjourned, and on the adjourned day the defendant put in a *plea in abatement*, alleging that the summons was not served *six days previous to the return* thereof; the plaintiffs joined issue, and the defendant proved that the summons was served in the *afternoon* of the *second day* of April, and that the summons

was returnable on the *eighth* day of April, at ten o'clock in the forenoon. The court decided that the plea in abatement was not well taken. The plaintiffs then called witnesses to prove their declaration, and the defendant adduced testimony on his part, and after hearing the proofs, the *justice's court* gave judgment for the plaintiffs for the penalty claimed, with costs. The defendant sued out a *certiorari* to the Columbia common pleas, who *reversed* the judgment of the justice's, with costs. The plaintiffs sued out a writ of error to this court.

C. M. Stebbins, for the plaintiffs in error.

A. L. Jordan, for the defendant in error.

By the Court, SAVAGE, Ch. J. In relation to the time of service of process and notices, the law does not regard fractions of a day. For the purpose of ascertaining the priority of liens upon real estate, the true time of docketing a judgment or recording a mortgage will be inquired into. So, for the purpose of ascertaining the conflicting claims of creditors upon personal property, the true time of delivering an execution to a sheriff, where several have been delivered on the same day, will be inquired into. But in the service of process, or of notices or pleadings in a cause, fractions of a day are not regarded. The service of the summons in this case, for the purpose of a day in the computation of time, was equally well served in the afternoon as in the morning. Our rule is well settled, that when days are mentioned in the statutes or our own rules, they are to be reckoned one exclusive and one inclusive. Thus a notice of argument is a notice of eight days. If the term commences on the ninth day of the month, the service must be on the first. If you include in the computation the day of service, you will have eight days, excluding the first day of term; if you exclude the day of service, you include the first day of term. So, when six days service of a summons are required, and it is returnable on the eighth, the service on the second is good. This rule of construction is said by the defendant's counsel to be inconsistent with the decision in *Small v. Edrick*, 5 *Wend.*, 137; but it will be seen the phraseology of the two statutes under which the questions arise, is different; the one requires the summons to be served at

least six days *before the time of appearance*; the other requires notice to be served at least fourteen days *before the first day of the court*. The latter excludes the first day of the court, and therefore requires fourteen days, one exclusive and one inclusive, excluding the first day of court, which our rules and the general rules of construction include. That case, is therefore, an exception to the general rule, and is so from the terms of the statute. There was no error in the justice's court in this part of the case.

Upon the merits, the facts proven were, that the defendant had on two occasions passed the gate without paying his toll; the first time was in the day time; the defendant stopped under a shed with his wagon after passing the gate, and came into the toll house; he did not pay the toll nor was he asked for it. The second time was in a stormy night; he was asked for the toll after he had passed, the gate being open; his answer was, that his son who was behind would pay it; the gate keeper went into the house, and the son who was to have paid, passed unobserved, and neither paid his own toll nor his father's, but would have paid it, had the gate keeper been at his post to receive it. On this evidence the justices determined that the defendant was guilty of fraudulently passing the gate. The common pleas reversed the judgment. What part of the justices' proceedings were adjudged erroneous by the common pleas, does not appear by the record. I have endeavored to show that they decided correctly as to the time of service of the summons. It is said by the plaintiffs' counsel, that the plea in abatement having been decided in favor of the plaintiffs, and the issue upon it being an issue of fact, they were entitled to judgment. To this it is answered, and I think conclusively, that the plaintiffs having given evidence upon the merits, they are now too late to complain of that erroneous decision. In *Haight v. Holly*, 3 *Wend.*, 263, the rule is correctly laid down by Mr. Justice Marcy, that when judgment is given for the plaintiff on a *demurrer* to a plea in abatement, the judgment is *respondeas ouster*; but when on an issue of fact, judgment is final. But no such question was raised before the justices' court, their attention was not called to the point; both parties went into the merits apparently by consent; it is now too late to derive any benefit from an error which seems to have been common to the parties;

the court, it is to be presumed, would have decided correctly, had they been required to make a decision upon the point.

The common pleas, it is presumed, reversed the judgment of the justices' court upon the merits. They had a right to do so. The statute declares, that "The judges of such court of common pleas shall proceed and give judgment in the cause as the right of the matter may appear, without regarding technical omissions, imperfections or defects in the proceedings before the justice, which did not affect the merits; and may affirm or reverse the judgment in whole or in part, and may issue execution as upon other judgments rendered before them." When a *certiorari* laid directly to this court, a similar power was given, as follows: "That in all cases of judgment removed by certiorari, the Supreme Court shall proceed and give judgment according as the very right of the case shall appear, without regarding any imperfection, omission or defect in the proceedings before the court below in mere matters of form." Under this power the court formerly reversed the judgments of justices, as well for errors of law as errors of fact. The courts of common pleas have now the same power; and in the case now under consideration, the common pleas reversed the judgment of the justices' court probably on the ground that the facts proved were neither evidence of force or fraud in passing the gate. If such was the ground of their decision, this court has no power to review it. Whether the defendant was guilty of force or fraud was a question of fact not to be reviewed on writ of error. As the record shows no error in the common pleas on any question of law, and as we have no right to inquire into the correctness of their decisions on questions of fact, the judgment must be affirmed. Had we the power, the judgment would not be reversed, as the court decided correctly.

Judgment affirmed.

SUPREME COURT.

S. W. & H. BALDWIN, v. W. CALKINS AND OTHERS.

(10 *Wend.*, 167. *Decided* 1833.)

* * * * *

Where a special power is granted by statute, affecting the property of individuals, as conferring upon the judges of a county court the power of assessing the damages of individuals in consequence of a public improvement, but requiring that such judges *should not be interested*, the statute must be strictly pursued, and it must in general appear on the face of the proceedings that it has been so pursued; yet where a party affected by such assessment had notice of the application to the judges who performed the duty assigned, appeared before them, contested the claim set up, and did not object to the proceeding on the ground of the interest of the judges, he was deemed to have *waived* the objection, although the fact was not averred that the judges were *disinterested*.

* * * * *

By the Court, SAVAGE, Ch. J.

* * * * *

The court say that the disagreement of the parties and consequent application lay at the foundation of the proceedings; that the disinterestedness of the judge and commissioners was necessary to an impartial decision. Consent cannot give jurisdiction, but cures irregularity. An appearance before judges of any other county than Onondaga could not give them jurisdiction, but cures any irregularity not objected to at the time. In this case the parties appeared and made no objection; this was an admission of the competency of the judges.

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SUPREME COURT.

BALDWIN AND OTHERS, SUPERINTENDENTS OF THE POOR OF ST. LAW-
RENCE COUNTY v. MCARTHUR.

(17 Barb., 414. Decided 1854.)

* * * * *

Where one of the members of a court of sessions granting an order of maintenance, is one of the persons who, as superintendents of the poor, apply for the order, the court has no jurisdiction and the proceedings and order are void.

The statute declaring that no judge of any court can sit as such in any cause in which he is a party, extends to justices of the peace. (2 R. S., 275, § 2.)

* * * * *

Barker & Sawyer, for the plaintiffs.

James & Brown, for the defendant.

By the Court, C. L. ALLEN, J.

* * * * *

In *The Washington Ins. Co. v. Price*, 1 Hopk. Ch. Rep., 1, Chancellor Sanford remarked, that it is a maxim of every case, in every country, that no man should be a judge in his own cause; that it is not left to his discretion, or to his sense of decency, whether he shall act or not; that when his own rights are in question he has no authority to determine the cause. So well said he is this principle understood, that in every court consisting of more judges than one, the judge who is a party in a suit takes no part in the proceeding or decision of the cause.

* * * * *

The terms of the statute are broad and plain. "*No judge of any court can sit, as such, in any cause in which he is a party.*" I do not see how we can avoid this express prohibition. If any exceptions had been intended in the statute, they would probably have been inserted. At all events I think we are not at liberty to make them, or indulge in any speculations on the subject. We are controlled by the law, and are only to pronounce what it is.

It is argued that Barnes was not a *judge*, but a *justice of the peace*, and that the statute applies to judges only, and cannot be carried beyond the plain import of the words used. But the court,

in the case of *Edwards v. Russell*, 21 *Wend.*, 63, put a different construction upon the statute, by deciding that the section applied to a justice as well as a judge, and said the same reasons existed for its application there, as well as in higher tribunals. (*See 3 Comst. 547; Hopk. Ch. Rep.*, 1.)

* * * * *

SUPREME COURT.

TALLMAN v. BIGELOW.

(10 *Wend.*, 420. *Decided* 1833.)

Affidavits of a *plaintiff* that *from reports and information* he believed that his debtor kept out of the county to avoid paying his debts, and of his *witnesses* that *they had been informed* that he had departed, and, *as his creditors said*, for the purpose of defrauding them, are not sufficient to authorize the issuing of an *attachment* by a justice.

This court reviews the proceedings of all subordinate tribunals as to their jurisdiction, and all questions of law arising before them.

* * * * *

ERROR on certiorari to a justice's court. Bigelow sued out an *attachment* against Tallman. The plaintiff, in the affidavit accompanying his application for process, stated that he believed that Tallman had departed from the county with intent to defraud his creditors, or to avoid the service of any process, and from reports and information, he believed that he kept out of the county to avoid paying his debts. The affidavits of two disinterested witnesses, required in such cases, were also produced, one of whom stated that he had been informed that Tallman had departed the county, and, as his creditors said, for the purpose of defrauding them out of their demands, and that he yet remained, as they believe, out of the county for the same purpose; the other stated that Tallman, as he believed, had departed from the county, and with the intent to avoid process being issued against him. The property of Tallman was seized under the attachment, and the justice, on hearing the proofs of the plaintiff, gave judgment in

his favor for \$100. The defendant sued out a *certiorari*, returnable in this court.

E. B. Morehouse, for plaintiff in error.

S. Crippen, for defendant in error.

By the Court, NELSON, J. The power of this court to revise and correct the errors of inferior tribunals, so far as the jurisdiction of such tribunals is concerned, and the determination of questions of law arising before them and apparent upon the record or history of the proceedings, has been too often adjudged to admit of question. 2 *Caines*, 179; 20 *John.*, 430; 5 *Wend.*, 98; 6 *id.*, 564.

There can be no doubt the justice erred in issuing the attachment in this case, the affidavits of the plaintiff and of the witnesses being clearly defective, within the provisions of the statute. 2 *R. S.*, 230, § 28. The case does not turn, as supposed by the counsel of the defendant, upon the question whether there was enough to give jurisdiction to the justice, so as to sustain the judgment until reversed, within the decision in 11 *John.*, 175, but whether the justice erred in the application of the rules of law in any part of the proceedings, as may appear from the return to the writ. There probably was sufficient to protect the justice, and all others acting under the judgment, until its reversal; but the affidavits, without which the justice was not authorized to issue the attachment, are necessarily a part of the record, and are properly returned by the justice; and we cannot but see that he erred in adjudging them sufficient within the statute.

* * * * *

Judgment reversed.

SUPREME COURT.

BIGELOW v. STEARNS.

(19 *John.*, 39. *Decided* 1821.)

If a court of limited jurisdiction issues process which is illegal ; or if a court, whether its jurisdiction be limited or not, holds cognizance of a cause, without having gained jurisdiction of the person of the defendant, by having him before them, in the manner required by law, the proceedings are void.

(*Vide Allen v. Crofoot*, 5 *Wend.*, 506; *Latham v. Edgerton*, 9 *Cow.*, 227; *Savacool v. Broughton*, 5 *Wend.*, 170; *Jackson v. Robinson*, 4 *Wend.*, 436; *Scott v. Ely*, *Ibid.*, 555; *Van Steenberg v. Bigelow*, 3 *Ibid.*, 42; *Putnam v. Man*, 3 *Ibid.*, 204; *Wheeler v. Townsend*, 3 *Ibid.*, 247; *Griswold v. Sedgwick*, 1 *Ibid.*, 126; *Colvin v. Luther*, 9 *Cow.*, 61; *Cunningham v. Bucklin*, 8 *Ibid.*, 178; *Sherman v. Ballou*, 8 *Ibid.*, 304; *Wattles v. Marsh*, 5 *Ibid.*, 176.)

And in the case of a limited and special jurisdiction, the magistrate attempting to enforce a proceeding founded on any judgment, sentence or conviction, in such a case is a trespasser. (*The rule as to the justice's liability, is, that where he has no jurisdiction whatever and undertakes to act, his acts are coram non judice, and void, equally so as if he was not a justice. If he has jurisdiction but errs in exercising it, then his acts are not void, but voidable only. In the former case he is personally liable, in the latter not. Per Savage, Ch. J., Adkins v. Brewer. 3 Cow.*, 209.)

And the party affected by the conviction, may, even in a collateral action, when the conviction is set up as a defense, show that the magistrate had no jurisdiction of the person convicted.

Whenever a new power is conferred upon a justice of the peace, he must proceed in the mode prescribed by the statute.

Where the act for suppressing immorality (*sess*, 36, c. 24, [1 *Rev. Stat.*, 674, 675]), which authorizes a justice to convict for offenses against the statute, requires him to cause the party to be brought before him, and upon proof, &c., to convict him in the manner prescribed : *Held*, that the justice could not on the return of a precept or summons, personally served, proceed to hear the proofs, and convict the party who had failed to appear, without having him brought before him.

THIS was an action of trespass, assault and battery, and false imprisonment, tried before Mr. Chief Justice Spencer, at the Columbia circuit, in November, 1820.

The plaintiff proved that he had been committed to the gaol of the county, on a warrant issued by the defendant, as justice of the peace, which was produced, from which it appeared that the plaintiff was convicted before the defendant, for willfully interrupting

a congregation of people met for religious worship, by rude and indecent behavior, contrary to the *act for suppressing immorality*. (Sess. 36, ch. 24. sec. 4; 2 N. R. L., 193.) And having neglected to pay the penalty of twenty-five dollars, adjudged for the offense, he was ordered to be committed to the county gaol for thirty days, pursuant to the statute.

The defendant produced in evidence the record of conviction. The plaintiff's counsel then offered to prove, that the defendant as justice of the peace, did not cause the plaintiff to appear before him on the complaint, as the act required, before he recorded the conviction and issued his warrant of commitment. The defendant's counsel objected to this evidence on the ground that the record of conviction was a complete justification of the defendant, and could not be contradicted if the defendant had jurisdiction of the subject matter. The chief justice decided that he would hear the evidence. It was proved that the defendant, on the 20th of November, 1819, issued his precept, directed to any constable, &c., commanding him to cause the plaintiff and three others forthwith, to appear before him, to answer separately, &c. The precept was signed but not sealed by the justice, having only the word "seal" in the margin. The constable endorsed on it his return, "served by reading on, &c., November 29, 1819;" he testified that he served it personally on the plaintiff, by reading the same to him, in the presence of his father, the plaintiff being an infant under twenty-one years. That the father requested him to delay the return until the next day at ten o'clock, A. M., at which time he accordingly returned the precept to the defendant; and that the plaintiff did not object to the arrangement. That the father of the plaintiff appeared the next day before the justice with counsel in behalf of the plaintiff, and objected to the process and the manner of its return; alleging that the defendant could not proceed, unless the plaintiff was brought personally before him. But the defendant said that the service and return of the precept was sufficient to authorize him to proceed; and the father of the plaintiff and his counsel then left the room in which the justice held his court; and the defendant proceeded to examine witnesses, &c., and imposed the fine of twenty-five dollars.

The chief justice directed the jury to find a verdict for such damages as they should think proper; subject to the opinion of

the court on a case to be made. The jury accordingly found a verdict for the plaintiff for ten dollars.

The case was submitted to the court without argument.

Spencer, Ch. Justice, delivered the opinion of the court.

I had no doubt upon the trial, that the conviction given in evidence by the defendant was a complete protection to him, as everything set forth in it, unless it was shown that the defendant had either exceeded his jurisdiction, or had not jurisdiction of the person of the plaintiff. I consider it perfectly well settled, that to justify an inferior magistrate in committing a person, he must have jurisdiction not only of the subject matter of the complaint, but also of the process and the person of the defendant. This point was fully and ably discussed in *Borden v. Fitch*, 15 *John.*, 121; and it was decided, that a judgment of divorce rendered by the Supreme Court of Vermont was void, because it had not jurisdiction of the person of the defendant. The authorities are numerous to this point. (5 *John.*, 41; 8 *John.*, 90, 197; *Kirby's Rep.*, 119; 1 *Dallas*, 261; 1 *Day's Con. Rep.*, 40, 45; 2 *Wils.*, 386; 2 *Str.*, 993.) If a court of limited jurisdiction issues a process which is illegal, and not merely erroneous; or if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause, without having gained jurisdiction of the person, by having him before them in the manner required by law, the proceedings are void; and in the case of a limited or special jurisdiction, the magistrate attempting to enforce a proceeding founded on any judgment, sentence or conviction, in such a case, becomes a trespasser. The case of *Mather v. Hood* (8 *John.*, 45), decides that a record of conviction of a justice under the act to prevent forcible entries and detainers, is not traversable; and if it appears that the justice had jurisdiction and proceeded regularly, it is conclusive, and a bar to a suit against him for anything adjudged and within his jurisdiction. But it was not decided in that case, nor is there any case that sanctions the doctrine, that by force of a conviction before a magistrate, the party affected by it, may not show, even in a collateral action, where the conviction is set up as a defense, or comes in question, that the magistrate had not jurisdiction of the person against whom the conviction operates. Take the case of a person convicted by a justice of the peace, who never had been summoned and who never appeared before him; would it

admit of a doubt that this fact might be shown, and if proved, that the whole proceeding would be *coram non judice* and void? The fourth section of the act under which this conviction took place (2 *N. R. L.*, 194, 195; 1 *Rev. Stat.*, 674, 675), after specifying the offenses of violating the sabbath, and interrupting and disturbing any assembly of people met for religious worship, proceeds to denounce the penalty, and provides, in case such offender be legally convicted, that he shall immediately pay the sum so forfeited, which may be a sum not exceeding twenty-five dollars; and if he does not immediately pay the amount, with the charges of conviction, or give security to the satisfaction of the justice, for the payment thereof, within twenty days thereafter, then the justice may, by warrant, under his hand and seal, commit the offender to the common gaol of the county, for a term not exceeding thirty days. The ninth section provides, that every justice shall, upon information given upon the oath of any person, *cause every offender against the act to appear before him*, and upon such information being proved, shall convict such offender in such manner as in and by the act is prescribed. The tenth section gives the form of conviction, and prohibits the removal into the Supreme Court, by *certiorari*, of any adjudication or conviction by virtue of the act. The importance and value of the principle, that the justice has not jurisdiction, unless the person convicted shall be legally before him, becomes more apparent, when we perceive that the aggrieved party is deprived of every method of protecting himself, but by action against the justice.

Was the plaintiff legally before the justice? I consider the process issued by the defendant as unexceptionable; it had no seal, and there is nothing in the act requiring it. The constable returned upon it, that he had served it by reading. It appeared in evidence that the plaintiff was never before the justice; that the process was served by reading it to the plaintiff in the presence and hearing of his father, who now prosecutes as guardian *ad litem* to his son. The father appeared with counsel before the justice and objected to the process and the manner of its being served, and insisted that the plaintiff ought to have been brought personally into court; these objections were overruled and then Gale Bigelow withdrew with his counsel.

It is a settled principle that whenever a statute confers a new

power upon justices of the peace, they must proceed in the mode prescribed by the statute. Various British statutes confer power on justices of the peace, to inflict penalties for offenses, on conviction, without requiring that the party should be summoned or compelled to appear. In *4th Bl. Com.*, 382, it is said the courts of common law have thrown in one check upon them, (summary convictions,) by making it necessary to summon the party accused before he is condemned; and it is now held to be an indispensable requisite. (*2 Ld. Raym.*, 1405; *1 Salk.*, 181.) It is evident that the summoning of the accused, was not specifically required; yet this has been considered a principle so necessary to the impartial administration of justice, that it cannot be dispensed with. The statute authorizing the proceedings against the plaintiff, requires of the justice to cause every offender against the statute to be brought before him. This, I consider essential to his jurisdiction; first, because the statute is mandatory upon the justice that it shall be done, and it is the mode pointed out in which he shall execute the summary powers confided to him; and secondly, because, from the nature of the case, the offender must be present; the party convicted has an option given him of paying the forfeiture, or giving security for the payment in twenty days; in default of complying with either alternative, the justice is bound to commit him, for a period not exceeding thirty days. It is essential that the offender should have an opportunity of electing to comply with one of the alternatives offered to him, by being present and informed of the forfeiture adjudged. It is no answer to say, that being summoned, he might appear. It was the duty of the justice to cause him to be brought before him. Neither is it an answer, that being an infant he appeared by his father. It is not a suit in which there can be a guardian *ad litem*. Under the twenty-five dollar act, in a proceeding instituted by warrant, had the same facts occurred, the proceedings would have been erroneous.

Judgment for the plaintiff.

SUPREME COURT.

BELLOWS v. SHANNON.

(2 *Hill*, 87. *Decided* 1841.)

* * * * *

In an action of trespass, assault and battery, committed upon an officer by one whom he was attempting to arrest on a warrant, the defendant set up, by way of rejoinder, that the plaintiff at the time, &c., *did not acquaint or give notice to the defendant that a warrant had been issued, or that he (the plaintiff), had any warrant or process, &c., nor did the defendant know that a warrant had been issued or that the plaintiff had any warrant or process*—to which the officer surrejoined that he *did acquaint and give notice to the defendant of the warrant, &c., concluding to the country.* This issue having been found for the defendant, *held*, not a case for judgment *non obstante veredicto*, and that he was entitled to judgment, though several other issues were found against him.

Semble, that a regular officer making an arrest within his proper district, is not bound to *show* his process, even though demanded.

He should, however, either before or at the moment of arrest, make known in some form that he comes in his official character, and not in that of a mere wrongdoer ; as otherwise he may be lawfully resisted.

And after the party has submitted to the arrest, the officer if required, is bound to inform him of the *substance* of the warrant or process.

If an officer, in making a forcible arrest, conceals the fact that he is acting under process, without any lawful excuse for so doing, *quare*, whether he can afterward use the process for the purpose of justifying the arrest ?

THE pleadings, and the questions raised upon them, may be briefly stated as follows : *Declaration* ; trespass, assault and battery, at Starkey, Yates county *pleas*. 1. Not guilty. 2. *Son assault demesne*, alleging that the plaintiff, with a large stone in his right hand, broke and entered the defendant's close and assaulted the defendant with great violence and rudeness, &c. *Replication* to the second plea, that the plaintiff was a constable of the town of Starkey and had a peace warrant issued by a justice of the peace of that town against the defendant, and attempted, without force or violence, to arrest the defendant, who unlawfully resisted with a strong hand ; whereupon the plaintiff, *moliter manus imposuit*, in order to arrest the defendant, doing him no unnecessary damage and using no greater force than was necessary, &c., which is the same assault mentioned in the second plea, &c. The warrant was issued on the complaint of one Curtis, who demanded sureties of

the peace against the defendant, alleging that the defendant had threatened to kill him and to destroy a quantity of plaister. *Rejoinder*, that the plaintiff *did not acquaint or give notice to the defendant that a warrant had been issued, or that the plaintiff had any warrant or process for the defendant's arrest*; nor did the defendant know that a warrant had been issued, or that the plaintiff had any warrant or process for his arrest, &c. *Surrejoinder*, that the plaintiff *did acquaint and give notice to the defendant that a warrant had been issued and was in the plaintiff's hands to be executed*, concluding to the country. The jury on the first issue—not guilty—found a verdict for the plaintiff, and assessed his damages at forty-five dollars; and the second issue, on the rejoinder and surrejoinder, they found for the defendant—that the plaintiff *did not acquaint or give notice to the defendant that a warrant had been issued, or was in the plaintiff's hands to be executed*.

H. Wells, for the defendant, now moved for judgment for the defendant *non obstante veredicto*, or that the judgment be *arrested*.

I. Taylor, contra, moved for judgment for the plaintiff *non obstante veredicto*.

By the Court, BRONSON, J.

* * * *

* * * *

Let us see now how much can be gathered from the pleadings, taken in connection with the verdict of the jury. The defendant assaulted the plaintiff. That fact is found by the jury on the plea of not guilty. But the plaintiff broke and entered the defendant's close, and committed the first assault. Those facts are well pleaded by the defendant, and are admitted by the plaintiff's replication. Thus far the defendant stands justified, on the ground that he was acting in necessary self-defense. That excuse is, however, sufficiently answered by the replication, which alleges, in substance, that the plaintiff was acting as a constable, having a warrant for the defendant's arrest, and used no more force than was necessary to execute the process. This brings us to the defendant's rejoinder and the issue joined upon it, which the plaintiff insists is so utterly defective that he is entitled to judgment notwithstanding the verdict. The jury have found, in the language of the issue, that the

plaintiff did not acquaint or give notice to the defendant that a warrant had been issued, or was in the plaintiff's hands to be executed; and it is alleged in the rejoinder, and, not being denied, is admitted by the surrejoinder, that the defendant did not know, by any other means, that a warrant had been issued. The case then comes to this: the plaintiff, being an officer and having a warrant, of which, however, the defendant knew nothing, broke and entered the defendant's close, and committed what, aside from the warrant, was an assault upon the defendant's person; and he did this without giving any intimation that he came as an officer to execute legal process. Every reasonable intendment is to be made in favor of the party who has the verdict, and it is not too much to presume that the plaintiff was entirely silent in relation to his object in breaking the close and making the assault. If he had said, "I have a warrant for you," or "I come to execute legal process," or had in any other way intimated the nature of his business, the jury would have been warranted in finding the issue in his favor; but they have found against him. We are not at liberty to say that the plaintiff had any good excuse for his silence, for upon this motion presumptions are not to be indulged in his favor. And besides, he has put himself upon another ground of pleading. He says he gave the defendant notice—not that he had an excuse for omitting to do so. He must, then, be regarded as having acted without any reference to his official character, or the process in his hands. Whether he could justify under the warrant in an action for false imprisonment, is a question not now before us. But he cannot, I think, complain that the defendant resisted what, so far as he had the means of judging was an illegal trespass upon his property and a rude assault upon his person. To allow an officer to recover damages in such a case, would be to permit him to take advantage of his own misconduct. A liberal protection should be awarded to public officers when they act uprightly; but they are entitled to no favor when they designedly act in such a way as to lead third parties into difficulty. When they fall into error in an honest effort to discharge their duty, it is enough that they are allowed to set up their official character as a shield. They should not be permitted to use it as a weapon of assault against one who has been misled by their improper conduct, and who has done nothing more than resort to the law of self defense.

The cases cited by the plaintiff's counsel relate to the question when, and under what circumstances, the officer is bound to show his warrant to the person arrested. Hawkins says, that a bailiff or a constable, if they be sworn and commonly known to be officers, and act within their own precincts, need not show their warrant to the party, notwithstanding he demand the sight of it. *Hawk. P. C. B.*, 2 c., 13, § 28, *Curwood's ed.* And to the same effect is 2 *Hale P. C.*, 116, *Lond.*, 1778; 1 *Burn. Just.*, 108, *Lond.*, 1785; 1 *Chit. Cr. L.*, 50, 1 ed., 1819. The editor of Hale thinks, that the warrant spoken of was not that for arresting the party, but the warrant by which the person making the arrest was constituted bailiff or constable. And see 1 *East's P. C.*, 319. And Hale elsewhere says, that if the officer be demanded he should show his warrant. 1 *Hale's P. C.*, 583. In *Hale v. Roche*, 8 *T. R.*, 187, Lord Kenyon thought it a most dangerous doctrine that the officer was not bound to show the warrant for the arrest when the party demands to see it, because it may effect the party criminally in case of resistance. He added "I do not think that a person is to take it for granted that another, who says he has a warrant against him without producing it, speaks truth." It seems, however, to be settled, that a regular officer acting within his proper district is not bound to show his warrant for the arrest, though it be demanded. *Arnold v. Steeves*, 10 *Wend.*, 514. But all the books agree that the officer is bound to give the substance of the warrant or process, to the end that the party may know for what cause he is arrested, and take the proper legal measures to discharge himself. *Isabel, Countess of Ruland's case*, 6 *Co.*, 54, 5. This is, however, where the party submits to the arrest, and not where he makes resistance before the officer has time to give the information. *Mackalley's case*, 9 *Co.*, 69; *Commonwealth v. Field*, 13 *Mass. R.*, 321. Although the officer is not bound to exhibit the warrant—especially where there may be reason to apprehend that it will be lost or destroyed—yet I cannot doubt that it is his duty to inform the party, where such is the fact, that he has a warrant, or to make known in some other way that he comes in his character as an officer to execute legal process; and not leave the party to suppose that he is assailed by a wrong-doer. See *Fost. Cr. L.*, 310, 11; 1 *Russ. on Cr.*, 451, 514. The contrary doctrine would be likely to lead to violence

and bloodshed. I do not say that the officer is bound to declare the particulars of his authority before he makes the arrest, or that it may not sometimes be proper to lay hands on the party before a word is spoken ; but either before or at the moment of the arrest, the officer ought to say enough to show the party that he is not dealing with a trespasser, but with a minister of justice. If the plaintiff had done so in this case, the verdict, we must presume, would have been in his favor.

As a question of evidence the jury would have been warranted in presuming, unless the contrary was shown, that the process was duly executed. But it is now too late to make any intendment in favor of the officer. The jury have found against him ; and as there is no motion for a new trial, we must assume that they were properly instructed by the judge, and that they found against the plaintiff because the evidence left them no room to presume in his favor.

Motions denied.

SUPREME COURT.

BURLINGHAM v. DEYER.

(2 *John.*, 188. *Decided* 1807.)

* * * * *

A justice of the peace cannot decide on his own previous knowledge, but only on evidence produced before him in court.

Per Curiam. * * * * *

* * * A justice cannot act from his own previous knowledge of facts ; but they must be proved before him. He must decide upon evidence produced in court. * * *

SUPREME COURT.

ADKINS v. BREWER & HARVEY.

(3 Cow., 206. *Decided* 1824.)

To give a justice jurisdiction of a cause upon attachment, proof must be made that the defendant is concealed or has departed, &c. And if the attachment issue without such proof and be executed, the whole proceeding being void, the justice and the plaintiff are trespassers.

So, *come semble*, if security by bond be not given, or mere blank bonds executed by the surety.

In trespass against a justice for issuing attachments and executions, &c., which were void, it appeared that the constable, who levied and sold under these, had several other executions, older than the void ones, upon which he levied and sold at the same time, and the sale was under all the executions indiscriminately; but the void executions, as well as the others, were satisfied by the sale, and the money paid to the plaintiff; held;—that trespass lay against the justice and party.

When the justice wants jurisdiction, he is liable as a trespasser: otherwise, he has jurisdiction, and errs in the exercise of it.

In trespass against an officer, for issuing process, by virtue of which plaintiff's goods are taken, to justify the taking, the officer must show affirmatively, on his part, that he had jurisdiction; especially where, from the plaintiff's proof, there is reason to presume that the proper steps were not taken to confer jurisdiction.

ON error from the Otsego Common Pleas. The action in the court below was trespass by Adkins against Brewer & Harvey, for taking and carrying away, and converting the goods and chattels of Adkins. Plea, not guilty. The cause came on to be tried in February term, 1822, when the plaintiff called one White as a witness, who testified that he went, at the request of Harvey, to the office of Brewer, who was a justice of the peace, in order to become bail for Harvey, to procure certain attachments against Adkins, which Harvey contemplated taking out; that the witness, in conjunction with Harvey, signed, sealed, and delivered printed blank bonds for that purpose; that one of them was either partially or totally filled up before its execution; that three others were signed, sealed and executed in blank; (these were then produced and appeared still to be blanks:) that the witness was in a hurry, as well as Harvey; that the witness delivered the bonds to Brewer, the justice, with directions to fill them up; that Brewer

was then filling up an attachment. The counsel for the defendant, on notice, produced but one attachment. The counsel for the plaintiff then gave in evidence three several executions, issued upon three several judgments, by Brewer against Adkins, in favor of Harvey, and also proved that the property in question was sold by one Holden, a constable, by virtue of an execution in favor of one Aaron Bigalow, and seven executions in favor of Selah Havens, all older than Harvey's, as well as by virtue of the several executions issued by Brewer; that about \$102 of the money raised by the sale, was paid to Harvey, upon his executions, which were issued on judgments rendered upon attachments where no bonds had been filled up, or executed, otherwise than as above stated.

The counsel for the defendant thereupon moved for a nonsuit, which was opposed, on the ground that there was no evidence of any proof of the absence or concealment of the plaintiff having been taken at the time the attachment issued; and that no bonds were taken pursuant to the 23d section of the 25 dollar act; that the defendants were, therefore, trespassers; but the motion was granted by the court below, on the ground that the judgments were voidable only; and that, inasmuch as it appeared that the constable's sale was made on a variety of other executions, as well as Harvey's without discrimination, trespass would not lie. To this opinion the plaintiff excepted.

Curia, per SAVAGE, Ch. J. The defendants are called on *directly*, not *collaterally*, to show why they have undertaken to dispose of the plaintiff's property. They must then show a lawful authority. A power to act is the first thing to be shown by a court of limited and special jurisdiction. To give the justice jurisdiction, it must appear that the person against whose property an attachment is sought, is either concealed within the county with the intent mentioned in the act, or has departed, or is about to depart the county with the like intent.

In *Van Steenburgh v. Korts*, 10 *John.*, 169, the court seem to consider the proof of this necessary to confer jurisdiction; and Spencer, J., takes the distinction between proof before a court which is to *give* it jurisdiction, and before a court that already *has* jurisdiction.

In *Vosburgh v. Welch*, 11 *John.*, 175, the court say, the justice

must be considered as having issued the attachment without any proof whatever of the departure or concealment required by the act; and of course without authority. The rule as to the justice's liability, is, that when he has no jurisdiction whatever and undertakes to act, his acts are *coram non judice* and void—equally so as if he was not a justice. If he has jurisdiction, but errs in exercising it, then his acts are not void, but voidable only. In the former case, he is personally liable—in the latter not. 17 *John.*, 146; 2 *John. Cas.*, 27; 14 *John.*, 246; 19 *John.*, 39.

I do not consider this case as coming within the rule that an officer is presumed to have done an act, the omission of which would render him liable for negligence. There is presumptive proof at least, that no evidence was taken by the justice, and positive proof that no security was taken, except in one cause out of four. The sale by the constable, after the other executions were satisfied, could not be justified, except upon the authority of these executions; and as they were void, there was no authority whatever; all persons concerned were trespassers.

The judgment of the court below must be reversed.

Judgment reversed.

SUPREME COURT.

HUNTER v. BURTIS & ELLSWORTH.

(10 *Wend.*, 358. *Decided* 1833.)

Where a *warrant* under the justice's act issues in favor of a *non-resident plaintiff*, the action may be brought before *any justice* of the county, and need not be brought before a justice of the town *where the defendant resides*, or of the *next adjoining town*.

In a suit *against a non-resident defendant*, the action must be brought before a justice of the town in which the defendant *may be* at the time of the commencement of the suit; but it is not necessary that a *non-resident plaintiff* should be *personally* in the county at the time of the application for process.

Where an illegal arrest is made, the attorney who appears to advocate the cause is not responsible, unless he officiously interposed in directing the arrest.

THIS was an action for *false imprisonment*, tried at the Saratoga circuit in May, 1831, before the Hon. Esek Cowen, one of the circuit judges.

The false imprisonment was alleged to consist in the arrest of the plaintiff on a justice's warrant, which it was insisted by the plaintiff had been *illegally issued*, on the ground of the want of jurisdiction in the justice. The facts were these: Samuel Burtis applied to a justice of the peace of the town of Saratoga Springs, in the county of Saratoga, for a *warrant* against Hunter, in favor of Stephen H. Burtis, and made affidavit that Stephen H. Burtis was a *non-resident* of the county of Saratoga, that he had a general power to prosecute all suits or demands for Stephen H. Burtis, and in other respects made such affidavit as is required by law, and gave the security required to be given on the issuing of a warrant in favor of a non-resident plaintiff. Whereupon the justice issued a warrant against Hunter, and delivered it to a constable, who arrested Hunter by virtue of the warrant in the town of *Stillwater* (in which town Hunter resided), and brought him before the justice in the town of Saratoga Springs. On Hunter's being brought before the justice, Samuel Burtis appeared as the attorney in fact of Stephen H. Burtis, and Ellsworth, the other defendant in this cause, appeared as the counsel of Samuel Burtis. After two other causes had been tried, in which S. H. Burtis was plaintiff, Ellsworth said that the plaintiff would withdraw his suit against Hunter alone, and bring it against him and the defendants in the causes just tried, jointly; and the suit against Hunter was accordingly discontinued. Ellsworth was not present at the issuing of the warrant, and gave no directions or instructions to the officer as to the arrest. It was admitted on the trial that the towns of *Saratoga Springs* and *Stillwater* are in the county of Saratoga, but are not adjoining towns, and that the defendants in this cause, at the time of the suing out of the warrant, were residents of the town of Saratoga Springs. The counsel for the defendants insisted that no illegal arrest had been shown, and that the plaintiff ought to be non-suited; and that at all events Ellsworth acting only as the counsel of Burtis, was not liable to a suit, although the warrant had irregularly issued. The judge refused to non-suit the plaintiff, and charged the jury that the justice had no jurisdiction; that the warrant and the arrest by virtue of it were illegal; that Stephen

Burtis was a non-resident of the county, and was not proved to have been in the county at the time of the application for the warrant, and the justice not residing in the town in which Hunter resided, or in the town adjoining, had no right to issue the warrant. The jury found a verdict for the plaintiff for \$10. The defendants move for a new trial.

J. Ellsworth & S. Stevens, for the defendants.

M. T. Reynolds, contra.

By the Court, NELSON, J. I am of opinion the judge erred, and that a new trial ought to be granted. It is provided by the Revised Statutes that a justice shall, upon application, issue a *warrant*, where the plaintiff is a *non-resident*, and tenders to such justice security for the payment of any sum which may be adjudged against him in the suit. 2 R. S., 228, § 17. The 19th section requires that the fact of non-residence be shown to the justice by affidavit. These requisites were strictly complied with, and undoubtedly gave to the justice jurisdiction in the case.

Actions, of which a justice has jurisdiction, must be brought before some justice of the town wherein either, 1. The plaintiff or any one of them reside; 2. Where the defendants or any one of them reside; or 3. Before some justice of another town in the same county next adjoining the residence of the plaintiff or defendant. 2 R. S., 226, § 6. But by section 9, if the plaintiffs be all non-residents of the county, or if the defendant be a non-resident of the county, then such action may be brought before any justice of the town in which such plaintiff or defendant *may be*. The construction given by the judge at the circuit to the 8th and 9th sections just cited was, that to give the justice jurisdiction, the plaintiff being a non-resident, must be *personally* present in the town in which the justice resides who is called upon to issue the warrant; or that otherwise the action must be brought before a justice of the town where the defendant resides, or before a justice of an adjoining town. I cannot assent to this construction of the act. The reasons for confining actions to certain towns in justice's courts were the convenience of parties, and to prevent plaintiffs from harassing defendants by calling them before distant magis-

trates. The first act on this subject was passed in 1818, and was incorporated in the general revision of the justice's act in 1824, and in both of them *non-resident* plaintiffs were excepted from the limitation. The 9th section is not so clearly expressed as it might have been, but I am satisfied its true and reasonable construction does not in this respect alter the law. The expression in relation to non-resident plaintiffs, that they may bring their actions before any justice of the peace of the town in which such plaintiffs *may be*, was intended to exclude all the restrictions before imposed, and to authorize them to apply to any justice in the county, at their option. This is, under any construction, the effect of it. Why should they be personally present in the town in which the justice resides, or even before him at the time of the issuing of the warrant? Their absence can in no way affect injuriously the rights of the defendant, as satisfactory security must be given "*for any sum which may be adjudged against them in the suit*" before the warrant issues. It was said, on the argument, that they would be amenable to the process of the defendant, if they were required to be present; but the obvious answer to this is, they need only be *in the town* in which the justice resides, or at most, before him *at the time of issuing the warrant*, according to the most literal interpretation. The benefit, therefore, in this respect, to the defendant, would require a calculation of chances which I think were not in the view of the legislature.

It is true the same expression is used to designate the town in which a *non-resident defendant* must be sued; and when the arrest is justified in reference to such party, the suit must be brought before a justice in the town in which he *may be*. We must construe these words, regarding the subject-matter to which they relate. When applied to the defendant, they limit the action to the town in which he may happen to be at the time; from the plaintiff, who is the actor, they remove all restriction, and authorize the suit before any magistrate in the county. The whole object of the *eighth* and *ninth* sections was the limitation of suits to particular towns, regarding the residence of parties; it clearly has not been extended to non-resident plaintiffs; they may, at their election, go before any magistrate in the county. By the thirty-ninth section, page 232, any plaintiff over twenty-one years of age may appear and conduct his suit *in person*, or *by attorney*;

and it is worthy of remark, that where the personal appearance of either party is required by the statute, it is so expressed. This was essential, otherwise an appearance *by attorney* would, by the above section, be in contemplation of law a personal appearance. See § 114, p. 245.

But if I had arrived at a different conclusion, from an examination of the *eighth* and *ninth* sections, I am of opinion the justice had jurisdiction to issue the warrant. Every preliminary step required by the act had been complied with, and the statute does not require that, before the issuing of the warrant, it be shown to the justice where the defendant resides, to enable him to judge of the propriety of issuing the process. If the warrant has been extended by the constable to a case not warranted by the law, which he is presumed to know, perhaps, under the strict rules applicable to courts and the officers of special and limited jurisdictions, he would be liable in this action; and if he executed the process under the special instructions of the plaintiff or his attorney, they might also be liable. 11 *John.*, 444; 7 *Cow.*, 261. But if the officer, without any other directions than the delivery of the warrant to be executed, enforced the execution in a case not warranted by these sections, he alone, I apprehend, would be responsible, unless such illegal arrest was approved of by the plaintiff or his agent. Even in such a case, the *attorney* who appeared to try the cause would not thereby subject himself to responsibility. If he officiously interfered in directing the arrest, which was no part of his duty as attorney, the rule might be otherwise; but appearing before the justice and conducting the suit for the plaintiff should not be under the peril of such responsibility.

New trial granted.

SUPREME COURT.

SPERRY, *ads.*, WILLARD.(1 *Wend.*, 32. *Decided* 1828.)

A counsellor of this court is privileged from arrest during the setting of the court, though not in actual attendance at term. The sheriff is bound to serve process, notwithstanding a claim of privilege. A counsellor, when sued, is not entitled to the service of papers and notices.

MOTION to set aside default. During the last October term the defendant was arrested at Plattsburgh on a *capias* issued against him. He claimed to be privileged from arrest as a counsellor of this court, which claim was recognized by the deputy, who discharged him without requiring bail. The *capias* was, notwithstanding, returned *cepi corpus*, and the plaintiff proceeded in the suit. Special bail not being put in, the plaintiff filed common bail *sec. stat.* entered the defendant's default for not pleading and perfected judgment. There was no service of the declaration, or of any notices in the progress of the suit, on the defendant, who stated, that from the time of the arrest, he had remained under the impression that no further proceedings were had against him, until he was informed that judgment was entered.

Watson, for defendant.

J. Paine, for plaintiff.

By the Court, SAVAGE, Ch. J. The defendant, as a counsellor of this court, was privileged from arrest during the sitting of the court. 1 *R. L.*, 418. It was the duty of the officer to serve the process, notwithstanding the claim of privilege. 18 *John.*, 52. The defendant would have been relieved from arrest on application to the court, but he would have been required to file common bail, as the object of the statute is only to prevent the arrest of attorneys and counsellors during term, where their attendance may be necessary for the benefit of suitors. This has been done by the plaintiff; the defendant cannot, therefore, complain of the arrest. As a counsellor the defendant was not entitled to the service of

papers and notices, as an attorney would have been, whether sued by bill or *capias*; that practice applies only to attornies. (*See* 17 *John.*, 1; 4 *Cow.*, 127.) As, however, the defendant has misapprehended his rights and swears to a defense on the merits, a stay of proceedings is ordered and leave given to plead on payment of all costs subsequent to the declaration, including the costs of opposing this motion.

SUPREME COURT.

E. A. & J. SECOR *v.* BELL, Sheriff, &c.

(18 *John.*, 52. *Decided* 1820.)

Attorneys and other officers of the court since the statute 1 *N. R. L.*, 418 *sess.*, 36, *ch.*, 48, are liable to arrest on mesne process and may be held to bail, like other persons; and they were always subject to be taken in execution on *ca. sa.* If an attorney or counsellor be taken on a *ca. sa.* during his attendance in court, having business to transact, he may be discharged on motion, on affidavit, &c. A judge at a circuit or sitting may also discharge him in like circumstances. A sheriff cannot take notice of the privilege of an attorney, nor can he discharge him from custody on process out of this court, on his producing a writ of privilege; and if he does so, he is liable as for an *escape*, for the amount of the debt with *interest* to the time of the escape and poundage, if the plaintiff has paid any.

DEBT against the defendant, as sheriff of the city and county of New York, for the escape of A. B., an attorney of this court, a prisoner in execution, at the suit of the plaintiffs.

On the 31st of May, 1819, a *ca. sa.* was issued on a judgment obtained in this court, by the plaintiffs, against A. B., an attorney, &c., for \$302.35, on which he was arrested by the defendant, during the *sittings* held in June, before Mr. Justice Van Ness, upon which the defendant produced a *writ of privilege* allowed by E. W. King, one of the judges of the Mayor's Court of New York. In obedience to this writ, the sheriff discharged A. B. from custody, and made return to the execution accordingly.

The questions submitted to the court on these facts were, whether the defendant is liable for an *escape*; and, if so, whether the plaintiffs are entitled to recover interest and poundage on the sum directed to be levied on the *ca. sa.* against A. B.

Spencer, Ch. J., delivered the opinion of the court. Tidd (*p.* 171), lays down the rule to be, that the sheriff cannot take notice of the privilege of an attorney; nor is he bound to discharge him, even upon producing a writ of privilege, except where the arrest was by process issuing out of an inferior court; in which case, he says, their writs of privilege ought to be allowed to them *instanter*; and that if an attorney or other officer of the K. B. be arrested, by process issuing out of the same court, he may move to be discharged on common bail.

By the twelfth section of the statute concerning counsellors, attorneys and solicitors 1 *N. R. L.* 418, every officer of the several courts of record are liable to arrest on *mesne* process, and to be held to bail as other persons. Attorneys, and other officers, were always subject to be taken in execution on a *ca. sa.* in this State. Our practice has been conformable to that of the court of K. B. They are relievable from arrest only on motion, and under the circumstances of the case. If an attorney be taken on a *ca. sa.* during his attendance in court, he having business to transact, the court, on an affidavit of the facts, and on motion, will discharge him from arrest; and this may, also, be done at the circuit on sittings.

The sheriff having no authority to discharge the attorney, on a writ of privilege, from the arrest on process out of this court, he is fixed with the debt, which will be the amount of the judgment, and the interest thereon at the time of the escape, but no interest since; and the poundage, if it has been paid to the sheriff, otherwise not.

Judgment for the plaintiffs.

SUPREME COURT.

COREY v. RUSSELL.

(4 *Wend.*, 204. *Decided* 1830.)

Attornies and counsellors of this court are not privileged from arrest, although such arrest prevents their contemplated attendance upon court, if the arrest be made whilst they remain at home.

A member of the legislature may be arrested after his return home, although fourteen days after the adjournment of the legislature have not expired.

PRIVILEGE of a counsellor of this court and a member of the legislature. On Friday evening, the *thirtieth* day of April preceding Monday, the *third* day of May (the commencement of the May term of this court in the city of New York) the defendant was arrested on a *ca. sa.* at his residence, a distance of 190 miles from the city of New York, he having intended on the next morning to proceed to New York, to attend the Supreme Court as a counsellor, where he was engaged as counsel in several causes noticed for argument. On this ground a motion was made for his discharge from the arrest, and also on the ground that he was privileged from arrest as a member of the legislature, *fourteen* days not having elapsed since its adjournment, which was on the *twentieth* day of April last.

By the Court, SAVAGE, Ch. J. Attornies and counsellors of this court are privileged from arrest whilst in actual attendance upon the court, or whilst going to or returning from court; the privilege extends *eundo et redeundo*, but whilst remaining at home they are subject to arrest. On this ground, therefore, the defendant is not entitled to a discharge. Nor can his privilege as a member of the legislature avail him, having actually returned to his home after the adjournment of the legislature. The protection from arrest is secured to enable members of the legislature to return to their homes, and having in fact returned, they cannot claim an exemption from arrest, although the fourteen days are not expired. The defendant can claim nothing on this ground. The motion is denied.

SUPREME COURT.

COLE v. M'CLELLAN.

(4 Hill, 59. Decided 1842.)

A person attending before a court or officer is not entitled to a witness' privilege from arrest, unless he attend *as a witness*; and this, though he be sworn and examined after the arrest.

The privilege of an attorney or counsellor from arrest, while attending court, may be waived by him.

Accordingly, where a counsellor, on being served with a *capias* authorizing him to be held to bail, omitted to claim any exemption, but rather invited the arrest, telling the officer to prepare a bail bond, which he afterward executed, *held*, that this amounted to a waiver of the privilege.

A counsellor is not privileged from arrest while attending before an examiner, master, or a judge *out of court*.

MOTION to be discharged from arrest on the ground of privilege. The defendant swore that he resided at New Rochelle, in the county of Westchester, and was a *counsellor* of the Court of Chancery. That on the 27th of October last, while attending an examination of witnesses at White Plains, in that county, before an examiner in chancery, as counsel for the defendant in a chancery suit, he was arrested and held to bail on a *capias ad respondendum* for an alleged assault and battery upon the plaintiff in this action. He further stated that on the day following he was examined as a *witness* on the part of the complainants in the chancery suit; but it appeared that he was not attending before the examiner as a witness, and was only called to give some explanations in relation to the testimony of other witnesses. The deputy sheriff who made the arrest did not know that the defendant was attending the examiner as counsel, and the defendant did not claim any privilege from arrest. When the deputy made the arrest in the morning the defendant said he should remain in town through the day, and told the deputy to prepare a bail bond, naming the person who would be his bail, and he would sign it. The deputy called again in the evening at the hotel where the defendant stopped and presented the bail bond. The defendant then mentioned that he was attending the examiner as counsel. The deputy inquired if any advantage could be taken on that ground, intending, as he swore,

to abandon the arrest if it was incorrect. The defendant replied that it would make no difference; that his name was not spelled right, and he could set aside the proceedings on that ground. The defendant did not object, but appeared desirous to sign the bail bond, and did sign it. The deputy swore that he should not have made the arrest if the defendant had denied his authority to make it.

J. L. Tillinghast, for the defendant.

W. W. Frothingham, for the plaintiff.

By the Court, BRONSON, J. Although the defendant was examined as a witness the day after the arrest was made, he had not been served with a subpoena, and was not attending the examiner as a witness. He is therefore not entitled to a discharge on that ground.*

If the defendant was privileged from arrest as a counsellor, I see no reason why the privilege could not be waived. In *Scott v. Van Alstine*, 9 *John.*, 216, it was said that an attorney could not waive his privilege; but that was where the defendant had been sued by bill as an attorney, and he pleaded that he had left the profession and become a farmer, and thus attempted to defeat the suit by renouncing his privilege. But it was held that the plaintiff had a right to treat him as an attorney so long as his name remained on the roll. Here the defendant not only omitted to claim any exemption, but he rather invited the arrest; and after having thus waived his privilege, I think he ought not to be heard in making this complaint. Honesty and fair dealing forbid it.

But there was no privilege. The statute has expressly subjected all officers of courts to arrest in the same manner as other persons, except during the actual sitting of the court; and no attorney, counsellor or solicitor is exempt from arrest while the court is sit-

* At common law it was not necessary for the protection of a witness that he should be in attendance under a subpoena or summons, if, upon application to him, he consented to attend without one; and hence it has been held that a witness attending upon request from another State or country, though not summoned or subpoenaed, is privileged. As to the general doctrine, see *Cowen & Hills' notes to Phil. Ev.*, 15 to 17, and the cases there cited.

ting, unless he is employed in some cause pending, and then to be heard in such court. 2 R. S., 290, § 86. It does not appear that the Court of Chancery, of which the defendant is an officer, was actually sitting at the time the arrest was made. And besides, the counsel must be employed in some cause to be heard in court. The exemption does not extend to an attendance before an examiner, master, or judge out of court.

Motion denied.

SUPREME COURT.

ALLEN v. MARTIN, and others.

(10 Wend., 300. Decided 1833.)

When a party arrested by an officer, breaks away and shuts himself up in his house, the officer is justifiable, in the attempt to retake him, to break open the *outer door* of the house of such party, without making known his business, demanding admission and receiving a refusal, where the pursuit is fresh and the party consequently aware of the object of the officer.

In an action of *trespass* against an officer who justifies under a justice's execution, evidence that the same officer *fraudulently* served the original process is not admissible; the remedy of the party must be *direct*, either by action for a false return, or by writ of error; he cannot *collaterally* impeach the proceedings.

THIS was an action of trespass *quare clausum fregit*, and for an *assault, battery and false imprisonment*, tried at the Warren circuit in December, 1830, before the Hon. Esek Cowen, one of the circuit judges.

The plaintiff proved that the defendants burst open his door in the night time, that he kept them at bay until morning, when they entered and took and carried him away. In defense it was proved that Martin, one of the defendants, as a constable, arrested the plaintiff on a justice's execution, and that the other defendants acted in his aid; that the plaintiff broke away from him, entered his house, pushed back the constable and closed the door. A witness for the plaintiff testified that previous to the bursting open of the door, Martin had entered the house of the plaintiff in the evening, clenched hold of him, saying I have got you, you damned

scoundrel, and dragged him out of the house ; a scuffle ensued, both fell to the ground, the plaintiff broke from the constable and entered his house, and the constable went off. It further appeared that the constable procured assistance, and on the same night returned and broke open the door. When the constable seized the plaintiff and dragged him out of the house, he said nothing as to his having an execution against the plaintiff. When he entered the house, previous to the bursting open of the door, the outside door was closed, but not latched. There was some evidence, though slight, from which it might, perhaps, be inferred that the constable had arrested the plaintiff in the morning previous to the arrest in the evening, and that the plaintiff had escaped from him. The plaintiff offered to prove that the defendant Martin served the *summons*, the first process in the suit in which the execution issued ; that he misread it, and informed the plaintiff that it was returnable on the *eleventh*, when in fact it was returnable on the *tenth* day of August ; that, in consequence of such misinformation, the plaintiff did not attend to the suit until the *eleventh* day of August, when he found that on the day preceding, judgment had been rendered against him by default ; that the constable *knew* that the plaintiffs in that suit had no legal claim or demand against the plaintiff in this suit, and that the plaintiff was a minor ; which evidence was objected to and rejected by the judge, who charged the jury, that if the plaintiff's door was even latched at the time of the entry for making the original arrest, the constable was not justified in entering ; but if the door was unlatched and not fastened, or, as seemed probable from the testimony, slightly ajar, the constable had a right to enter to arrest the plaintiff ; and he further instructed the jury that the constable having been forcibly resisted and expelled from the house it was not necessary for him to make a formal demand of leave to re-enter the house ; that the conduct of the plaintiff was equivalent to a refusal to grant leave, and that the demand would have been idle ; but if the jury should find that in the retaking of the plaintiff, unreasonable and greater force had been used than was necessary to effectuate the object, viz., the recaption of the plaintiff, the defendants were liable to damages. The jury found for the defendants ; and the plaintiff now moves for a new trial.

By the Court, NELSON, J. The case of *Putnam v. Mann*, 3 *Wendell*, 202, disposes of the first question. There can be no doubt the judgment before the justice cannot be impeached in this collateral way, and that so far as its validity is concerned, the return of the service of the summons is conclusive, except on a direct proceeding to reverse the judgment for the irregularity. The party injured has an ample remedy, either by action for a false return, or by writ of error.

The testimony was sufficient to prove a previous arrest and escape before the defendants broke into the plaintiff's dwelling house for the purpose of retaking him on the execution. The language of the officer was highly discreditable to his manners and morals, but his acts were, in judgment of law, a legal arrest, and the defendant, (now plaintiff,) ought to have submitted. *Jenner v. Sparks*, 1 *Salk.*, '78; *Bul. N. P.*, 62; *Hornes v. Battyn*, *Foster's Cr. L.*, 320, § 22. In the pursuit to retake the defendant, the officer had an unquestionable right to break open the *outer door* of the house, after making known his business, demanding admission, and a refusal. *Foster's Cr. Law*, 320, § 22; 1 *Salk.*, '78. There was no proof of demand and refusal in this case, but under the circumstances, such proof was not necessary. After the officer had been thrust out of the plaintiff's house, and the door shut upon him, it would have been a senseless ceremony for him to have turned round, made known his business, and demanded admission. The plaintiff's conduct superseded the use and object of these steps. It was said, upon the argument, that the judge erred in assuming that the plaintiff forcibly turned the officer out of the house, as the fact was otherwise. I think the testimony warranted this inference, notwithstanding the evidence of the sister. But this is not very material, for whether the fact was so or not, that the plaintiff was fully advised of the purposes of the officer when he returned with the *posse*, cannot be doubted. Indeed the case discloses, that in the course of the day preceding the first arrest, a difficulty had occurred between the parties in reference to this execution and the arrest of the plaintiff upon it, and which no doubt gave the harsh character, in some respects, to the subsequent proceedings. The verdict I think right, both in law and fact.

New trial denied.

SUPREME COURT.

ARNOLD v. STEEVES & FROST.

(10 *Wend.*, 514. *Decided* 1833.)

A warrant issued under the *justice's act*, is not spent, if the justice, on the defendant being brought before him, after calling the parties, declares himself unable to try the cause, and directs them to go before another justice.

Nor is it spent, nor is the defendant entitled to be discharged if *the next justice* before whom he is taken is also unable to try the cause.

Previous to the Revised Statutes, the constable had a right to detain the defendant for a reasonable time, while making a *bona fide* effort to find a justice to hear the cause; the period now is fixed at twelve hours.

The assent of an officer to the escape of a defendant whom he has arrested does not affect the rights of the plaintiff, and even the officer, if the process be *mesne*, may retake the defendant.

A regular officer is not bound to exhibit his authority or process when he arrests a defendant; a special deputy is.

ERROR from the Saratoga common pleas. This was an action for *false imprisonment*. Steeves, a constable, arrested Arnold on a justice's warrant at the suit of Frost. The warrant was issued the 26th December, 1827, by A. Goodrich, Esq., a justice of Ballston Spa. The constable took the defendant before Justice Goodrich, and the warrant was returned. The parties were called and appeared, when the justice said he could not attend to the case, and the parties must go before the nearest justice. They accordingly went before Palmer, another justice in the same village, who also excused himself from trying the cause. Arnold offered to go before either of the two justices who were named, but Frost, the plaintiff in the warrant, declined to do so, preferring, as he expressed himself, some justice who attended court. The parties remained in the village about two hours, until toward night, when Arnold told Steeves, in the presence of Frost, that he had taken counsel and should go home. Steeves told him he had better not go; Frost made no objection. Arnold left the village and Steeves went with him; after proceeding about three miles, they stopped at a tavern; Arnold then said, in the hearing of Steeves, that he was going home, and went accordingly, and Steeves went to his home in another direction. On the next day Arnold went from home and was gone three or four weeks. A few days after his

return, he was arrested again by Steeves, on the *same warrant* on which the first arrest took place. Arnold demanded of Steeves that he should show his authority for making the arrest, which he refused to do; Arnold made his escape, and on the next day surrendered himself and brought an action for *false imprisonment* against Steeves and Frost. The court submitted to the jury the question whether Frost had consented to the discharge of Arnold from the custody of Steeves, and the jury, under the instructions of the court, found a verdict for the *defendants*, on which judgment was entered. The plaintiff sued out a writ of error. The cause was submitted on points presented by the counsel.

J. Ellsworth,^r for the plaintiff in error.

O. G. Otis, for the defendants in error.

By the Court, SUTHERLAND, J. Under all the circumstances of this case, I do not think the warrant on which the plaintiff, Arnold, was arrested is to be considered as spent, or as having finally done its office, by what took place in relation to it before Goodrich, the justice by whom it was issued. Arnold himself did not so consider it at that time, for he went voluntarily and without any objection or complaint, in quest of some other justice, who might be at leisure to try the cause. *Laws of 1824*, p. 281, § 4.

Nor was the process spent and the defendant entitled to be discharged because the next justice to whom they went was also unable to attend to it. The constable had a right to detain the defendant for a reasonable time, while making a *bona fide* effort to find a magistrate to hear the cause. There was not at that time any precise limitation to the period for which he might detain him; the Revised Statutes have since fixed it at twelve hours. The detention in this case, previous to Arnold's escape, seems to have been considerably less than that time. The jury have found that Frost, the plaintiff in the warrant, did not consent to the escape of Arnold; and admitting that Steeves, the constable, did permit him to go, it being but *mesne* process, his right to retake him or arrest him anew was not gone. (6 *Johns. R.*, 62; 2 *T. R.*, 177.)

A regular officer is not bound to exhibit his authority or process when he arrests a defendant ; a special deputy is. But if it were his duty to exhibit it when demanded, his refusal would not constitute him a trespasser, if he could show that he had a regular legal process in his possession, which authorized the arrest. The charge of the court was correct.

Judgment affirmed.

SUPREME COURT.

REED V. GILLET.

(12 *John.*, 296. *Decided* 1815.)

Where on the return of a *summons* before a justice, served by *copy* the defendant does not appear, the justice may issue a *warrant*.

In an action of debt on a judgment in a justice's court, it is not necessary to show that the person or justice before whom the judgment was obtained was a magistrate, or that he had not been superseded at the time the judgment was rendered. And if the record of the judgment is proved by the testimony of the justice, not on oath without any objection being made at the time, it is sufficient.

IN error, on *certiorari*, to a justice's court.

On the 5th of June, 1813, Gillet sued Reed by summons, which was returned, served by copy.

A warrant was then issued, at the return of which the plaintiff declared in debt on a judgment recovered before William Parkes on the 3d of April, 1813, alleging that he could not prosecute said judgment to execution, because Parkes had been removed from office. The defendant pleaded that judgment should have been rendered against him upon the summons, and that a warrant ought not to have been issued ; and that the plaintiff had produced no evidence that Parkes was even a justice of the peace. These objections were overruled. William Parkes then stated, not on oath, but without any objection being made, that the record produced in court was the original record of the judgment recovered before him, the amount of which had never been paid to him ; and the defendant admitted, in open court, that he had never paid any

part of the judgment. Upon this the court below gave judgment for the plaintiff for 18 dollars 80 cents damages, and 2 dollars 96 cents costs. The justice, in his return, assigned as one reason for his judgment, that he knew Parkes acted as justice as late as the 1st of April then last, and that his *supersedeas* was dated on the 9th of April; but added, that he rendered judgment principally from the defendant's confession.

Per Curiam. This judgment must be affirmed. The defendant below not having appeared upon the service of a copy of the summons, it was regular in the justice to issue a warrant; and to have given judgment without issuing another summons or a warrant, would have been erroneous. Nor is there any weight in the other objection, although the justice may not have assigned a good reason for overruling it. The objection was not that Justice Parkes had not been superseded, but that he was not a magistrate when he rendered the judgment, upon which the present suit was founded. The judgment was proved by the magistrate before whom it was obtained in a manner not objected to, and which was equivalent to an admission of the judgment. This was, at least, *prima facie* evidence of the authority of Parkes to render such judgment; and it would not be necessary upon an action founded on that judgment, which remained in full force, to show that the person before whom it was obtained was a magistrate.

Judgment affirmed.

SCHENECTADY GENERAL TERM, MAY, 1850.

CADY, PAIGE, WILLARD AND HAND, *Justices*.

ALLEN v. STONE.

(9 *Barb.*, 60.)

It is a general rule that the time for the appearance of a defendant served with a summons issued by a justice of the peace shall not be less than six or more than twelve days, and that the summons shall be served at least six days before the time of appearance mentioned therein. This rule is *prima facie* applicable to all cases, unless the party can show to the justice such facts as will authorize a summons of a different character to be issued.

Where a return of a justice to a *certiorari* shows no fact authorizing him to issue a summons returnable in two days, it will be held *prima facie* that a summons thus issued was issued without authority.

It cannot be inferred that the defendant was a non-resident of the county, where there is no fact stated in the return to warrant that supposition.

Where the defendant is a non-resident of the county, and the plaintiff is also a non-resident, he is not entitled to a short summons, without proof of that fact and giving security for the payment of any sum which may be recovered against him.

A justice should wait an hour after the time, when a summons is returnable, before he proceeds to swear witnesses in the cause.

Where there is nothing in a justice's return, upon *certiorari*, to show that the defendant did not appear within an hour after the summons was returnable, a decision rejecting a plea to the jurisdiction, on the ground that the defendant did not appear in time, is erroneous.

When a short summons has been issued by a justice in behalf of a non-resident, without the necessary securities having been given, the justice should nonsuit the plaintiff the moment that the fact is made known to him.

A defendant, by pleading the general issue, after the defense first offered by him has been overruled by the justice, does not waive the objection which has been thus overruled.

THIS cause originated in a justice's court, where Stone was plaintiff and recovered judgment. Allen carried the cause by *certiorari* to the Washington common pleas, where the judgment was affirmed, and the cause was removed into this court by writ of error. The return showed the following facts: a non-resident plaintiff; a resident defendant; a short summons issued; no *affidavit* made of the plaintiff's non-residence, nor any security for costs given. The defendant immediately on appearing, distinctly objected that no affidavit had been made or security given. The

court overruled this objection, and decided that the defendant ‘appeared too late for any other purpose than to cross-examine the plaintiff’s witnesses in mitigation of damages.’

Jas. Gibson, for the plaintiff in error.

E. F. Bullard, for the defendant in error.

By the Court, Cady, J. Roby G. Stone was plaintiff, and Joseph Allen was defendant in the action before the justice, and I shall so distinguish them in the following opinion.

On the 22d day of November, 1845, James McIntyre, one of the justices of the county of Washington, on the application of Harvey Chalmers, on behalf of the plaintiff, issued a summons against the defendant, returnable on the 24th day of that month, at one o’clock in the afternoon. The summons was returned personally served, on the day it was issued. On the return day of the summons, the plaintiff appeared by his attorneys, Harvey Chalmers and Enoch Keelland, and declared against the defendant, who did not appear until the testimony on the part of the plaintiff was closed. Up to that time nothing had been done to give the justice any right to proceed to the trial of the cause. The statute (2 R. S., 2d ed., 228, § 14) requires that the time for the appearance of a defendant served with a summons, shall not be less than six nor more than twelve days from the date of the summons; and § 15 requires that the summons shall be served at least six days before the time of appearance mentioned therein. This is the general rule, and, *prima facie*, it is applicable to all cases; and a party applying to a justice for a summons must be content with one according to the above rule, unless he can show to the justice such facts as will authorize a summons of a different character to be issued. The return of the justice in this case shows no fact which authorized him to issue a summons against a defendant returnable in two days after it was issued. *Prima facie* therefore, it was issued without authority.

On the part of the plaintiff it is insisted that the suit before the justice was regularly commenced, supposing that the defendant was a non-resident of the county of Washington; but there is no fact stated in the return to warrant the supposition. The sum-

mons was issued in the county of Washington, to a constable of that county; the defendant was found in that county, and the presumption is that he resided there; and the evidence in the cause shows that that was the place of his residence. If the defendant had been a non-resident of the county of Washington, the plaintiff, being a non-resident of that county, was not entitled to a short summons without proof of that fact, and giving security for the payment of any sum which might be recovered against him. (2 *R. S.*, 2d ed., 160, § 17; 201, § 291.)

The summons in this case was returnable at one o'clock in the afternoon, and it appears, from the justice's return, that at the time and place specified for the return of the said summons, the attorneys for the plaintiff appeared and declared in the cause, and that the justice proceeded to swear and examine witnesses on the part of the plaintiff, although the defendant had not appeared. The justice ought to have waited an hour after the summons was returnable, before he proceeded to swear witnesses in the cause.

The fair inference from the return is, that the justice did not wait any time after the summons was returnable, but proceeded at one o'clock to examine witnesses. That the justice proceeded to the trial of the cause too soon, has not been made a ground of complaint, and it is only alluded to for the purpose of showing that the justice's return furnishes no evidence that the defendant, by any delay in appearing, had not the right to make any defense he chose. The return of the justice shows, that after the evidence on the part of the plaintiff was closed, the defendant appeared by James Gibson, his attorney, and objected to any further proceedings in the suit, on the ground that no security had been given for the defendant's costs, nor any proof made that the plaintiff was a non-resident, so as to entitle him to a short summons. The court overruled the objection, and stated that the defendant appeared too late to offer a plea to the jurisdiction, or to object to the proceedings in the cause, and stated that he thought an affidavit or security for the defendant's costs unnecessary. Why was the defendant too late? There is nothing in the return showing that he did not appear within an hour after the summons was returnable.

The justice erred in deciding that the defendant had appeared too late to make any defense he pleased. He erred in deciding that it was not necessary that the plaintiff should have proved

that he was a non-resident of the county of Washington, and have given the security required by statute. The moment the fact was made known to the justice that the plaintiff was a non-resident of the county and had not given the necessary security, he ought to have nonsuited him.

Although the defendant pleaded the general issue after the justice had overruled the defense first offered by the defendant, he did not thereby waive the objection which had been overruled. The justice would only allow the defendants to plead the general issue in mitigation of damages; and the justice also decided that the defendant appeared too late in the cause for any other purpose than to cross-examine the plaintiff's witnesses in mitigation of damages. This was a repetition of the error in restricting the defendant in his defense, and I am of opinion that the judgment of the Common Pleas and of the justice ought to be reversed.

Judgment reversed.

SUPREME COURT.

BENNETT v. FULLER.

(4 *John.*, 486. *Decided* 1809.)

It seems that a sheriff, who is plaintiff, may serve his own writ. *See Tuttle v. Hunt*, 2 *Cov. Rep.*, 436; *Putnam v. Mann*, 3 *Wend. Rep.*, 202. But where the defendant was under a mistake as to the arrest, the court set aside a default entered for want of a plea, on an affidavit of merits.

A MOTION was made in behalf of the defendant to set aside the proceedings in this cause for irregularity, on an affidavit that the defendant was never arrested. The plaintiff was a deputy of the sheriff of the county of Delaware. In his affidavit he swore that he did arrest the defendant, and explained to him the nature of the writ; that he served the writ himself, as a deputy sheriff, but did not require any bail.

An interlocutory judgment for want of plea was entered for the plaintiff, and a writ of inquiry of damages executed.

Per CURIAM. The question is, whether there has been a legal service of this writ. It appears from some of the cases (*Cro. Car.*, 416; 19 *Viner*, 443, *note*; *Moore*, 547), to be a doubtful question whether a sheriff can legally serve a writ where he is the plaintiff. In the present case the writ was served by a deputy. No bail was required, and the sheriff returned the writ and is responsible. As the practice of deputing the plaintiff to serve his own writ has been of long duration, we think it would be going too far to say that the plaintiff cannot, in any cause, serve a writ in his own favor. A declaration in ejectment is always served by the party; and where the writ is served without executing bail, there can be no oppression, and it is analogous to the service of a declaration in ejectment. As the defendant, however, appears to have been mistaken as to the service, and swears to the merits, he ought to be let in to plead, on payment of costs. (*Vide Davenport v. Ferris*, 6 *John. Rep.*, 131.)

VAN NESS, J., dissented.

Rule granted.

SUPREME COURT.

SKELLINGER v. YENDES.

(12 *Wend.*, 306. *Decided* 1834.)

An *instrument in writing*, signed by a *constable* and his *sureties*, engaging that he shall collect and pay over all executions that are collectible, and that the signers will be accountable to all persons in whose favor any execution may come for the damages in the same, if not paid over to them according to the statute, &c., is a *valid instrument* within the statute; and an action may be maintained on it by a *creditor* who has caused an *execution* to be put into the hands of the constable for collection, which has never been *returned*.

Neither the constable or his sureties can object that the instrument is not *under seal*; nor that it is not *in the form* prescribed by the statute; nor that the sureties have *not been approved* by the clerk or supervisor of the town for which the constable was elected.

ERROR from the Jefferson common pleas. Skellinger commenced a suit in a justice's court against Yendes, as a *constable*, and the others as his *sureties*, for not returning an execution put into his hands for collection. The plaintiff obtained judgment,

and the defendants appealed to the Jefferson common pleas. On the trial in that court, the plaintiff produced an instrument in writing, *signed* by the defendants but not *sealed*, in these words: "Whereas, John B. Yendes has been appointed a constable in and for the town of Rodman, county of Jefferson, for the year 1828, and till the first Tuesday in March, 1829, now we, the subscribers, engage that all papers that shall come into his hands as a constable, shall be well and faithfully executed by him, and that he shall collect and pay over all executions that are collectible, and that we will be accountable to all persons in whose favor any executions may come, for the damages in the same, if not paid over to him or them, according to the statute in such case made and provided; and also, we are accountable for all attachments and summons, &c., appertaining to the said office of constable. Dated at Rodman the fifth day of March, 1828." On the back of the instrument was an endorsement signed by the town clerk of Rodman, in these words: "This bond, executed March 5, 1828," but *no approval of the sureties* was endorsed. The plaintiff proved that on the 15th January, 1828, he obtained a judgment before a justice of the peace against one T. Basset for \$19.11, and that on the 19th of February following, an execution was issued upon such judgment, and delivered to John B. Yendes, an acting constable of the town of Rodman, and that the execution had never been *returned*. The plaintiff having rested, the defendants objected that the instrument produced in evidence was not a *valid instrument* within the statute, and prayed that the plaintiff might for that cause be nonsuited. The court nonsuited the plaintiff, who sued out a writ of error.

T. C. Chittenden, for plaintiff in error.

J. Clarke, for defendant in error.

By the Court, SAVAGE, Ch. J. The plaintiff was nonsuited on the ground that the instrument produced on the trial was not a *valid instrument* within the statute. Whether that decision was correct, is the question.

By adverting to the cases reported upon the subject of the liability of constables and their sureties upon instruments purport-

ing to be taken under the act of 1813, 2 *R. L.*, 126, it will be seen that the court has been, as it was its duty to be, liberal in its construction, in order to promote the beneficial objects of the legislature. The statute does not give the form, but only the substance of the security. It has been held that it may be in the form of a *bond to the people*, with a proper condition; or a *simple undertaking* to pay each person such sum of money as the constable shall become liable to pay on account of any execution put into his hands for collection. It has also been decided, that where a bond to the people is taken, the action of *debt* may be brought in the name of the people, for the benefit of any person entitled to an action; or it may be in *covenant*, upon the condition, in the name of such person. The statute declares that the bond shall be filed within ten days after the election, and before the constable enters upon the duties of his office; yet the bond has been held good, though not filed within the ten days; and it cannot be doubted that the constable himself would be responsible for every act done by him, before filing the bond. The statute being directory to the officer himself, he cannot take advantage of his own omissions. Nor is there any reason why the sureties should not be liable, notwithstanding the want of a compliance with the statute provisions; in this case it seems that the *town clerk neglected to endorse his approval* of the sureties. That provision was intended for the benefit of those who should put executions into the hands of the constable, and has no connection with the liability of the sureties. Their signature was all that was necessary to make them liable. If the bond was not approved and filed, the omission might be considered a refusal to serve, and the vacancy might be filled; but there is nothing in the language or the policy of the statute which renders void any such instrument, executed for the security of the execution creditors.

It is also objected, that the instrument executed by the defendants was *not sealed, nor in the form* contained in the statute. To this objection I give the same answer as above; it is sufficient that the substance is there. The substance of the instrument required by the statute is, that the constable and his sureties shall be responsible for all such sums as the constable shall become liable to pay by reason of any execution delivered to him for collection. The instrument executed in this case contains unnecessary recitals;

they do no harm, and are mere surplusage. It also contains an agreement that all papers put into the constable's hands, attachments and summonses, shall be faithfully executed; that does no harm. But it also contains an agreement that he shall collect and pay over all executions that are collectible, and will account to all persons in whose favor any execution may come for the damages in the same, if not paid over to them according to the statute. This is equivalent to saying that they will pay such sums as the constable shall become liable to pay on account of any execution delivered to him for collection.

According to these views, the plaintiff was entitled to recover. The instrument is a valid agreement by the persons who executed it, in so far at least as execution creditors are concerned. That was the only question decided by the common pleas, and therefore the only one discussed here.

Judgment reversed with costs; *venire de novo* from the Jefferson common pleas.

SUPREME COURT.

CONNELL v. LASCELLES.

(20 Wend., 77. Decided 1838.)

It is not enough to justify the issuing of a *warrant* against a debtor on the ground of an *intent fraudulently to dispose of his property*, that he has executed a mortgage of a portion thereof, and refused to confess a judgment or give security, declaring a determination to manage his property himself.

ERROR from the Montgomery common pleas. Lascelles sued out an attachment against Connell from a justice's court, on an affidavit made by him that Connell was indebted to him in the sum of \$45.46 on contract; that he had demanded payment, which had been refused; and that Connell also had refused to give a judgment for the amount, saying that his property, except some hay, was under mortgage, and that he wanted to have the management of his property himself. Lascelles further stated in the affidavit, that, when he requested Connell to give him a judgment or security, he offered to give day of payment for six months, but

that Connell refused, and immediately left him in a great hurry to place his property, as deponent believed, out of his hands, in order to prevent him from collecting his demand. He further added that, from the conversation of Connell, and from his conduct, he *believed* that he would make such disposition of his property as to defraud his creditors. On this affidavit, the justice issued an attachment, upon which certain property was taken, and subsequently rendered a judgment against Connell, and issued an execution. The Montgomery C. P. on *certiorari* affirmed the judgment, and Connell thereupon removed the record into this court by writ of error.

H. Adams, for the plaintiff in error.

D. Cady, for the defendant in error.

By the Court, NELSON, Ch. J. The affidavit on which the attachment issued is defective. We might possibly have considered it sufficient to uphold the judgment until reversed, but here is a direct proceeding to test its validity, and if sanctioned, must be a precedent for all future cases. We have heretofore rejected the *belief* of the party, and applying that rule to this case, but little more is left than the *refusal* to give a confession of judgment. It is said he admitted that there was a mortgage upon his property, but that of itself is no evidence of a fraudulent disposition of it. So, too, the declaration that he wanted the management of his property himself did not authorize the inference that he wanted it for the purpose of so managing it as to defraud his creditors. This is not the fair import of his language. We might as well dispense with the affidavit in these proceedings as to approve of the affidavit in this case. A party, when allowed to be a witness in his own case, should be required to make out at least a *prima facie* case of an intent to commit a fraud. The judgment must be reversed.

SUPREME COURT.

SCROEPEL v. TAYLOR

(10 *Wend.* 196. *Decided* 1833.)

An *attachment* against the property of a person who temporarily resided in a county where the process issued, was held good on a bill of exceptions, although *his usual place of residence* was shown to be in *another county*; it appearing that the attachment issued on due proof and the proper bond being given, and it being stated that there was no evidence that the person against whom *trover* was brought for the property taken under the attachment, knew the defendant in the attachment, or where he resided, or that he had a family.

A *justice of the peace* may issue process and make it returnable *at any place* in the county in which he is an officer.

ERROR from the Onondaga common pleas. Taylor sued Schroe-
pel in Onondaga common pleas, in an action of *trover*, for two
horses and other property deposited with the defendant by a con-
stable, who had taken the same by virtue of two attachments
against the plaintiff. It appeared that in November, 1829, Taylor
came into the town of *Volney*, in the county of Oswego, to assist
one Chace, who had taken a job of the defendant to clear a quantity
of land; that he brought with him horses and certain furniture for
house keeping, and was to receive of Chace \$12 per month for his
services and the use of the property; the plaintiff and Chace lived
in a *shanty* while they worked on the job, but went away before
the job was completed. On the 14th December, 1829, an attach-
ment was issued against the property of the plaintiff at the suit of
one Soule, by a justice of the peace of the town of *Hastings* in the
county of Oswego, returnable at the dwelling house of the defend-
ant in the town of Volney, where the justice was when the attach-
ment was issued, he attending there at the request of the defendant,
and being the nearest justice in the county of Oswego to the dwel-
ling house of the defendant. The attachment was taken out on the
oath of the applicant, and the justice testified that it was issued on
due proof and *proper bond being given*. The defendant signed the
bond (probably as surety). The plaintiff proved that he was a
resident of the town of *Manlius*, in the county of *Onondaga*, where
he had a family for which he provided; that there was no evidence
that the defendant knew the plaintiff, or where he resided, or that

he had a family. The constable to whom the attachment was delivered, seized the property in question and put it into the hands of the defendant, who gave a receipt for it, to be delivered to the constable when called for. A copy of the attachment was left by the constable at the *shanty*, which had been inhabited by the plaintiff and Chace. A demand of the property and refusal to deliver it was shown. The counsel for the plaintiff insisted that the attachment was void, 1. Because the justice, when he issued the same, was not in the town in which he resided, but in an adjacent town, nor was the attachment made returnable in the town in which the justice resided; and 2. Because the plaintiff was not a resident in the county of Oswego when the attachment was issued, within the meaning of the statute, and was not liable to be proceeded against by attachment. The common pleas sustained these positions, and charged the jury that the plaintiff was entitled to recover. The jury found a verdict for the plaintiff for \$228.69, on which judgment was entered. The defendant having excepted to the charge of the court, sued out a writ of error.

J. A. Spencer, for plaintiff in error.

B. Davis Noxon, for defendant in error.

By the Court, SAVAGE, Ch. J. The question to be decided by this court is whether the attachment was void for either or both the reasons assigned by the court below. I will consider them separately.

1st. The justice acted, in issuing the attachment, while he was in point of fact out of the town in which he resided. The acts of the justice in this case were done in 1829, before the Revised Statutes took effect. Those statutes, therefore, cannot be considered in deciding this question. In the case of *Guernsey v. Lovell*, 9 *Wend.*, 319, the jurisdiction of justices of the peace was considered. In England they always were and now are *county officers*. They were such in this State unquestionably until 1818. The jurisdiction of each justice was coextensive with the county; they all possessed a concurrent jurisdiction in civil and criminal proceedings. There were certain powers, however, which they exercised as officers of the *town*; they presided at town meetings;

they with the supervisor, composed the commissioners of excise; they assisted in auditing town accounts; they made orders respecting paupers and bastards, etc. In these cases and some others, the statutes had conferred powers upon justices of the town in which those powers were to be exercised. But in the trial of civil causes, any justice of the county might act anywhere in the county; and such was the practice. The act of 1818 limited the number to four in each town; from this it followed that a justice removing from the town of his residence vacated his office, but the statute limiting the number, made no other alteration in the powers and duties of the officer. The jurisdiction of the officer was the same as before; that act affected only the tenure of the office, not the jurisdiction. The act of 1824 made no change in the tenure or the jurisdiction of the office. Until 1830, therefore, there was no law prohibiting, either expressly or by implication, any justice of the peace from issuing process and trying causes in any part of the county in which he resided, provided his residence continued the same as when he was appointed or elected to office. The mode of appointment to the office certainly could make no difference in the powers or extent of jurisdiction of the officer. The office of constable is, strictly speaking, a town office, yet the jurisdiction is coextensive with the county. The constable also loses his office by removal; but while he resides in the town which gave him the office, he may exercise the office anywhere in the county. On this point my conclusion is, that until 1830 the office of justice might be exercised anywhere within the county, and that the attachment in question was regularly issued, in so far as respects the place where the act was done.

2d. The defendant in the attachment was in point of fact an inhabitant in the town of Manlius, in the county of Onondaga, where he had a family for which he provided. The statute under which the attachment was issued, authorized any justice of the peace of any county, on proof by a creditor that any person against whom he has a demand hath departed or is about to depart from such county, or is concealed within the same with intent to defraud his creditors, or to avoid the service of process, to issue an attachment, etc., the justice taking a bond according to the statute. In *Adkins v. Brewer*, 3 Cow., 206, it was decided that a justice who issued an attachment without such proof and security as the

statute requires, acted without any jurisdiction and was liable as a trespasser; but if the proof and security had been given, and it subsequently appeared that the facts proved were in point of fact untrue, that could not have rendered the justice a trespasser. When they are proved by such evidence as the statute required, then the justice has jurisdiction and his process is valid; it is proper, therefore, to inquire what was the proof before the justice. It appears by the testimony of the justice that one Ephraim Soule applied to him for an attachment against Taylor, and *on due proof and the proper bond being given*, he issued the attachment. The attachment issued and bond taken were produced and read in evidence; it was taken out on the oath of the applicant. From the bill of exceptions, then, it appears that the attachment was issued on *due proof*, which we must understand to be the proof required by the statute; and it affirmatively appears that there was no evidence showing that the defendant below, Schroepele, knew the plaintiff, Taylor, or where he resided, or that he had a family; and it may be added that it does not appear that the justice had any knowledge on the subject, or that the proof before him was anything but *due proof*. It was shown, on the trial of this cause in the court below, that Taylor and one Chace were strangers in Volney, and that Taylor was called Johnson; that Chace had taken a job of clearing land, and that he and Taylor had lived in a shanty for a month or more near the job, and that they both went away before the job was completed. The case of *Dudley v. Staples*, 15 *John.*, 196, was cited to show that an attachment can only be issued against a person who has departed from his usual place of residence, and not where he might be occasionally traveling through a county. It must be borne in mind that that case came up on *certiorari*, and it appeared from the return of the justice that the proof upon which he issued the attachment was, that an attempt had been made to serve a warrant upon the defendant, and that he ran away to avoid the service, and was then absconding to avoid such service. In that case, the attachment was served by leaving a copy at the plaintiff's store, where the defendant had been shortly before. It also appears in that case, that on the return of the attachment, the defendant appeared and objected to the proceedings as improperly commenced. The fact of his residence in another county must have been proved or admitted, and

appeared upon the return. The objection to the service of the attachment must in that case have been made to the justice and overruled by him. So had the defendant in the attachment here appeared before the justice and shown the fact of his residence in another county, and the other facts which appeared on the trial of this cause, he would have been entitled to a judgment in his favor. The question here, however, is not whether a judgment rendered by a justice under the circumstances disclosed should be reversed, on *certiorari*, but whether an attachment issued on *due proof* is a valid process. There is no evidence in the case to show that the justice acted without a compliance with the requirements of the statute; the evidence is that the proper evidence and security were given; the attachment was, therefore, regularly issued. The justice having jurisdiction, the attachment was a justification to the constable, and the defendant in the court below, the plaintiff in error, was the agent or servant of the officer; he took the property from the officer and gave a receipt for it. It also appears that the plaintiff in error sent for the justice, and executed the bond upon which the attachment issued, which is all the agency which he appears to have had in the business; he was ignorant of the fact that Taylor had any residence out of the town of Volney, or that he had a family or a place of residence out of the town of Volney. On the second point, therefore, my conclusion is that the attachment, having been issued upon due proof and security, was a valid process and a justification to the officer and those who acted at his instance or under his authority.

On the whole case, therefore, as presented on the bill of exceptions, the plaintiff below failed to show any cause of action. The judgment of the court of common pleas for the county of Onondaga should therefore be reversed, and a venire *de novo* be awarded; costs to abide the event.

SUPREME COURT.

STEWART v. BROWN.

(16 Barb., 367. Decided 1853.)

Where an application is made to a justice of the peace for an attachment on the ground that the defendant *has left the county* where he last resided, with intent to defraud his creditors, the plaintiff must state the grounds of the application in his own affidavit and then he must prove *the facts and circumstances* to establish such grounds, either by his own affidavit or that of some other person or persons.

Where an attachment is issued by a justice under the 26th and 27th sections of the second article of the title of the Revised Statutes, relating to courts held by justices of the peace, the justice is not authorized to issue a summons upon the return of the attachment; but must enter judgment upon the attachment.

THIS action was commenced by attachment before a justice of the peace of the county of Fulton. On the 12th day of July, 1852, the plaintiff made an application in writing for an "attachment against the property of the defendant." He accompanied his application by an affidavit in which he stated the amount of the defendant's indebtedness, arising upon contract, to be \$9.54, and that the application was made "on the ground that defendant has departed from the said county of Fulton, where he last lived, with intent to defraud his creditors as that deponent is informed and verily believes." Garret Van Vranken a witness produced by the plaintiff, also made an affidavit on the same day in which he deposed as follows: "I know that John A. Brown has disposed of his property for the purpose of defrauding his creditors. And this deponent further says that the wife of said Brown told this deponent that said Brown had disposed of his property and left said county for the purpose of defrauding his creditors. She told him so this day."

On these papers the justice issued an attachment, returnable on the 19th day of July, then instant. On the return of the attachment he issued a summons upon the return of which he rendered judgment for the plaintiff. The defendant appealed to the county court, and the cause was certified to this court.

W. A. Beach, for the appellant.

C. S. Lester, for the respondent.

By the Court, C. L. ALLEN, J. The attachment was issued under the provisions of the 26th and 27th sections of the second article of the title of the Revised Statutes relating to courts held by justices of the peace (2 *R. S.*, 230; *Id.* 4th ed., p. 431, §§ 24, 25), on the ground as specified in the affidavit "that the said John A. Brown has departed from the said county of Fulton, where he last lived, with intent to defraud his creditors as deponent is informed and verily believes." This is almost within the words of the 26th section. The plaintiff is mistaken in supposing that the attachment was issued under the non-imprisonment act, passed in 1821. The 34th section of that act as amended by chapter 107 of the laws of 1842, and which is incorporated in the justices' act (2 *R. S.*, 4th ed., 460), provides that 'attachments may issue whenever it shall satisfactorily appear to the justice that the defendant is about to remove from the county any of *his property*, with intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of or secrete any of his property with the like intent, whether such defendant be a resident of this State or not. The application in this case was not based upon the ground that the defendant had *disposed of his property* with intent to defraud his creditors, but that he had departed from the county where he last resided with that intent. The plaintiff states this as the *sole ground* upon which the application was founded. He is required to state the grounds *in his own affidavit* and then he may *prove the facts and circumstances* to establish such grounds, by his own affidavit or that of some other person or persons. The affidavit of the plaintiff does not show any fact or circumstance in support of the grounds; nor is it pretended that it does. But it is contended that the affidavit of Van Vranken is sufficient for that purpose. He swears positively, as a fact within his own knowledge, that the defendant has disposed of his property for the purpose of defrauding his creditors; that is, he swears to the law without disclosing a single *fact or circumstance* to show whether such intent is to be inferred or not. A man may dispose of his property and dispose of it honestly, for the purpose of paying his debts or supporting his family, and the law will so infer, unless facts and circumstances are shown going to prove that he makes such disposition with a fraudulent intent. The witness is not to judge himself, of such intent, but is to disclose the facts to the

justice, who is to be satisfied *judicially* and upon legal proof—not *belief* alone—which is virtually all to which Van Vranken swears. Besides, in this case, as before remarked, the application was not put upon the ground that the defendant had fraudulently disposed of his property, but that he had *departed from the county where he last resided*, with intent to defraud his creditors. There is no fact or circumstance sufficient to support this ground, stated in either affidavit. Van Vranken does, to be sure, swear that the defendant's wife told him, that day, that her husband had disposed of his property and left the county for the purpose of defrauding his creditors. But he does not even swear that he believed what the wife told him. If the defendant himself had declared that he had removed from or left the county with intent to defraud his creditors, and such proof had been made to the justice, it would probably have been evidence upon which he could have acted judicially. But no such fact appears, and within the cases (14 *Wend.*, 237; 20 *Id.*, 145, 77; 10 *Id.*, 420; 13 *Id.*, 404; 4 *Denio*, 118; 11 *Barb.*, 520), the affidavits were altogether insufficient.

There is another defect here, and that is, the issuing of the summons and rendering judgment on the return of that process. The sections under which this attachment issued, do not authorize the issuing a summons, but require judgment to be entered without a summons.

There are other points, but it is not necessary to examine them, as the judgment must be reversed for these reasons.

Judgment reversed.

SUPREME COURT.

JOHNSON v. MOSS.

(20 *Wend.*, 145. *Decided* 1838.)

An affidavit to obtain an attachment against a party *for having departed the county with intent to defraud his creditors* is good, although the applicant swears only to his *belief* as to the *intent*, provided he sets forth facts and circumstances upon which such belief is founded.

Where the proceeding is under the provisions of the Revised Statutes, it is no objection that there are more than *four days* between the teste and return of the process.

A return of a constable, that by virtue of an attachment against A. B. he had levied on certain property, will be intended to be a return that he levied upon the property of the defendant.

On a common-law *certiorari*, if the justice had jurisdiction, his judgment will not be reversed, though it be rendered on an insufficient declaration or defective proof; nor will such judgment be reversed, although it be for an amount nearly double the sum alleged by the plaintiff to be due to him on obtaining the attachment.

COMMON-LAW *certiorari* to a justice's court, returnable in this court. MOSS, on the 16th May, 1836, sued out an *attachment* against the goods and chattels of JOHNSON. He made affidavit that JOHNSON was indebted to him in the sum of \$27, over and above all discounts; that he *believed* JOHNSON had departed the county with intent to defraud his creditors, and then stated the facts and circumstances on which he grounded his belief, viz., that JOHNSON was a man of but little property and owed a good many debts; that he departed the county of Otsego in a clandestine manner in *March* last, taking with him a span of horses, wagon and harness, and most of his property liable to execution; that his family said he had gone to Albany, but the applicant for the attachment had been informed by one of his neighbors that he was in Tioga county; all of which he believed to be true. The justice issued an attachment, dated 16th May, returnable 23d May. The constable made return that he levied upon *one fall, &c., of a table*, and had left a certified copy of the attachment, and an inventory at the dwelling-house of the defendant with his family, he not being found in the county; the attachment was not served personally. On the return day the plaintiff appeared, but the defendant

did not appear ; the plaintiff declared for goods, wares and merchandise, &c., &c., and called a witness who gave evidence of the plaintiff's demands. The justice rendered a judgment for \$45.83, besides costs. The case was submitted on written arguments. The plaintiff in error insisted : 1. That the affidavit was insufficient. 2. That the attachment was erroneous in having *six* days between its teste and return, whereas the process should have been a summons returnable not more than four days from its date. (*Statutes, Sess. of 1831, p. 403, § 33.*) 3. That the *return* of the constable was insufficient, inasmuch as it did not show that any property was levied upon ; or 4. That the declaration was insufficient ; and 5. That the judgment was manifestly unjust, it being for \$43.83, when the indebtedness was alleged to be only \$27.

H. Bennett, for the plaintiff in error.

Morehouse & Lathrop, for defendant in error.

By the Court, BRONSON, J. This attachment issued under the provision, 2 *R. S.*, 230, § 26, 28, as amended by *Laws of 1831, p. 404, § 35*, on the ground that the defendant had departed from the county where he last resided, with intent to defraud his creditors. In stating the *intent* with which the defendant departed, the applicant, as must generally be the case, only swears to his belief ; but the facts and circumstances on which the application was founded are directly and positively alleged. The case does not fall within those of 10 *Wendell*, 420, and 14 *id.*, 237.

The attachment did not issue against the defendant as a *non-resident*, *Laws of 1831, p. 403, § 33*, but on the ground that the defendant had *departed from the county with intent, etc.*, 2 *R. S.*, 230, § 26, and in such cases there must not be less than six nor more than twelve days between the teste and return of the process. *Id.*, § 30. There is, therefore, nothing in the objection that there were more than four days between the teste and return of the process.

The justice states that the constable returned that he had attached a *table* ; the return itself seems to have been that the constable levied upon *one fall, etc., of a table*. Whichever may be correct, it is impossible to maintain the objection that *no property* was

levied on. Again, it is said that it does not appear that the levy was on the defendant's property. The attachment required the officer to take the *defendant's* property, and the constable returns that *by virtue of the attachment* he has levied on a *table*, etc. The fair and reasonable intendment is, that the property taken belonged to the defendant. The return was, I think sufficient.

Should it be admitted that the declaration was defective, we could not interfere. This is the common-law *certiorari*, and we cannot look beyond those questions which go to the jurisdiction of the justice. *Birdsale v. Phillips*, 17 *Wend.*, 464. On the return of the attachment, the previous proceedings having all been regular, the justice acquired jurisdiction to hear and render judgment. If he did so upon an insufficient declaration, or on defective proof, the error cannot be reached in this form. But the declaration is well enough.

In the affidavit on which the judgment issued, the plaintiff stated his claim at \$27, and the judgment was rendered in his favor for \$45.83, besides costs. It is not improbable that injustice has been done the defendant, but a common-law *certiorari* will not help him.

Judgment affirmed.

SUPREME COURT.

HENRY REINMILLER v. EDWIN T. SKIDMORE and another.

(7 *Lansing*, 161. *Decided* 1872.)

It seems an affidavit, on application for an attachment to a justice of the peace, showing grounds under the Revised Statutes, and also under the act of 1831, (*chap.* 300, § 30, &c.), will authorize its issue under either.

And when a summons has been taken out against the defendant in the attachment, and the subsequent proceedings are in conformity with the act of 1831, that it may be presumed to have issued under that act, and although it contains a recital that it is issued upon proof that the defendant is about to depart, &c.

If the justice approves the bond, it will uphold his jurisdiction against a stranger to the proceedings, *e. g.*, a lessor of the property levied on, not party thereto, notwithstanding a mistake in the condition, *e. g.*, an omission to provide for the payment of all moneys received from the property levied on, over and above, &c.

Reversal of the judgment in the action, on which execution has issued against the attached property, does not, it seems, invalidate the levy or sale, or make either the party or officer a trespasser.

It merely annuls the title acquired through the sale, and entitles the owner of the chattel to recover it from any one into whose possession it has come.

One holding a chattel for a time, *e. g.*, a year, paying monthly sums for a particular use, and no other, and prohibited from selling or loaning, is not a lessee, but mere licensee, having no interest liable to an attachment against his property.

THIS was a motion upon a case and exceptions for judgment on the verdict of a jury ordered to be heard in the first instance at General Term.

The plaintiff sued to recover the possession or value of a baker's wagon which he had let to one Faust, a baker, by written instrument, for one year, at a monthly rent of ten dollars, payable on the first day of each month, and containing also the following provisions: "The use of said wagon is only for his baker business, and not for any other use. The party of the second part is not allowed to sell said wagon, or to make a loan of the same."

It appeared that Faust was indebted for goods sold and delivered to the defendant, Skidmore, who applied to a justice of the peace at Newburgh, Orange county, for an attachment, under the provisions of the several statutes of the State, against Faust's property; upon his own affidavit and that of one Bull, his clerk, from which it appeared that the claim arising on contract, as mentioned, was for forty-two dollars, and that the application was made on the ground that Faust was about to depart from the county of Orange, where he resided, with intent to defraud his creditors. The affidavit also set forth facts showing that Faust was secretly causing his property to be removed from that county, and had abandoned his home and place of business, and kept himself concealed with like intent, *viz.*, to defraud Skidmore and other creditors.

The justice took and approved of a bond in the penalty of \$100, given by Skidmore and another, conditioned for the payment of all damages and costs by reason of the issuing of the attachment if he (Skidmore) should fail to recover judgment, and also conditioned that if Faust should recover, Skidmore would pay all moneys which should be received by him (Skidmore) from any property levied upon under an attachment, over and above the amount of the judgment and interests and costs thereon, and an

attachment issued to Roche, a constable, the other defendant here, reciting that "whereas Edwin T. Skidmore hath applied for an attachment against the property of F. Faust, against whom he hath a claim for goods sold, arising on contract, \$42.02, and produced satisfactory proof that the said F. Faust is about to depart the county of Orange with intent to defraud his creditor," and commanded any constable, &c., to attach so much of the goods, &c.

By virtue of this attachment Roche levied on the baker's wagon, then in the possession of Faust, who held under the written instrument, a year not having elapsed since its execution and delivery to him.

A summons was afterwards issued to Faust in favor of Skidmore, and judgment went against him by default in Skidmore's favor. Execution was issued upon the judgment, and the wagon, then being in the constable's hands, was sold by him and possession delivered to the purchaser.

Faust afterward appealed from the judgment rendered against him by the justice, and it was reversed.

The plaintiff demanded possession of the wagon from Roche while he held it under the attachment, and brought this suit after the expiration of the term for which Faust was entitled to it.

John Miller, for the plaintiff.

Fullerton & Anthony, for the defendant.

By the Court, GILBERT, J. The affidavit was sufficient to authorize an attachment to be issued, pursuant to either the Revised Statutes or the act of 1831. (2 *R. S.*, 230, § 26; *Laws of 1831*, § 34.) Under the former statute, an attachment may issue, on proof that the debtor is about to depart from the county, while the proof required by the latter is confined to acts of the debtor, relating to his property. The affidavit contains all that is required by both statutes, but it might be inferred, if it was material, that the attachment was issued under the act of 1831, because a summons was taken out against the defendant in the attachment, and the subsequent proceedings were in conformity with that act.

The bond given was in the penalty required by the act of 1831, and although a mistake was made in the condition of it, yet it

was approved by the justice, and as against the plaintiff, a stranger to the proceedings, it ought to be held sufficient to uphold his jurisdiction. (*Bascom v. Smith*, 31 *N. Y.*, 595.) The defendant in the attachment might have waived the defect, and that seems to be the test, whether it was a nullity or a mere irregularity. (*Clapp v. Graves*, 26 *N. Y.*, 418.)

We think the return of the constable was a substantial compliance with the statute.

Parol evidence of the execution and of the sale thereunder, was admitted without objection. It is too late now to raise that objection.

The cases of *Hull v. Carnley* (1 *Kern.*, 501; *S. C.*, 17 *N. Y.*, 202), and the authorities therein cited, are decisive of the right to sell the interest of a lessee of a chattel, by virtue of an execution against him, and to deliver possession of the chattel pursuant to the sale, as was done in this case. Nor does a reversal of the judgment on which the execution issued, in such a case, invalidate the levy or sale, or make either the party or the officer a trespasser. It merely annuls the title acquired by means of the sale, and entitles the owner of the chattel to recover it from any one into whose possession it has come.

If, therefore, the interest of Faust in the chattel had been that of lessee, as all parties have assumed, the defendant would have been entitled to judgment. But it was not such an interest. The instrument of hiring provided that "the use of said wagon" should be "only for his baker business, and not for any other use," and prohibited a sale or loan of the wagon. The legal effect of the instrument was to confer upon Faust merely a personal license to use the wagon. Such an interest cannot be the subject of sale under an execution. For this reason the plaintiff is entitled to judgment.

Judgment accordingly.

SUPREME COURT.

ACKERMAN v. FINCH.

(15 *Wend.*, 652. *Decided* 1836.)

A justice of the peace is not bound to require proof of the authority of a person who claims to appear as *attorney* for one of the parties in a cause prosecuted before him, if the other party does not object to such appearance ; if a party does not object to the appearance of his adversary by attorney, he will be deemed to have admitted his authority to appear.

A summons under § 32 of the *act to abolish imprisonment, &c.*, may be sued out by a justice against a *non-resident* defendant, without proof of indebtedness or the giving of security.

In cases where security is required *before* the issuing of process, the error cannot be remedied by giving the security *after* the process is issued.

ERROR from the Broome common pleas. Finch sued Ackerman in a justice's court in the county of Broome, and sued out a *summons* under § 32 of the *act to abolish imprisonment, &c.*, Session Laws of 1831, p. 403, returnable in *three days*. The application for the summons was made by a person who appeared as attorney for the plaintiff and made an affidavit that the defendant was indebted to the plaintiff in a certain sum, and that both parties were *non-residents* of the county of Broome. On the day of the return of the process the plaintiff appeared by his attorney, and declared on a promissory note. The defendant did not appear in person but another person appeared as his *attorney* and objected to the further prosecution of the suit on the ground that *security had not been given* previous to the issuing of the summons, by the plaintiff or in his behalf, for the payment of any sum which might be adjudged against him. The justice refused to dismiss the proceedings, because, in the evening of the same day on which the summons was issued and after it was served, the attorney for the plaintiff had given the required security. The defendant's attorney then put in a plea in bar, and the cause was tried and judgment was rendered for the plaintiff. The defendant sued out a *certiorari*, removing the proceedings into the Broome common pleas, and the justice in his return stated that the authority of the attorneys to appear for the respective parties was not proved ; that the only proof of authority he had, as it respects the plaintiff's

attorney, was his swearing out the summons and producing the note declared on; and in respect to the defendant's attorney, no objection was made to his appearance, nor was he required to produce proof of his authority. The common pleas affirmed the justice's judgment and the defendant sued out a writ of error.

W. Platt, for plaintiff in error.

D. S. Dickinson, for defendant in error.

By the Court, COWEN, J. Neither attorney objected to the authority of the other, and the justice neither required nor took any proof of their authority pursuant to the 2 R. S., 233, § 45. I think, however, that *non-objection* must be received for *admission* within the meaning of the statute. That declares expressly that admission shall be equivalent to proof. 2 R. S., 233, § 45. Ackerman has adopted the acts of his own attorney in appearing and making questions in the cause, by now insisting on the objections as his own. The attorney was equally his for the purpose of waiving objections. The statute requiring proof was passed for the security of the opposite party, and a man may always waive a law introduced for his own benefit. But it is different with regard to the *summons*. As to that the objection was made. This process is given by the act to abolish imprisonment for debt, and its return is reduced in time. It shall be made returnable in not less than *two* nor more than *four* days from the date thereof, in case the *plaintiff* be a non-resident of the county, on the like oath and security as in case of a warrant in favor of a non-resident. *Session Laws of 1831*, p. 403, § 32, 2 R. S., 228, § 17. But the *defendant* was himself a non-resident, and the 33d section provides that when, by § 30, no warrant can go, the defendant may be proceeded against by *short summons* or *short attachment*. It adds that, if such defendant be proceeded against otherwise, the justice shall have no jurisdiction of the cause. Taking the 30th and 31st sections together, which the 33d section intends we should do, no warrant can in general issue upon a contract. The question arises upon this section, whether any security be necessary where the defendant resides out of the county. The true meaning of the section is, that the defendant shall be proceeded against primarily

by short summons, or secondly by attachment, provided a proper case for this shall exist; and, in order to entitle the party to the extraordinary process, no doubt he must give proof and security, whether the defendant be resident or non-resident, and whether the plaintiff be so or not. The proof and security in this case respects the nature of the proceeding; and sections 32 and 33 may therefore be considered, for the purposes of the present question, precisely as if they were each providing simply for the ordinary process of summons. The attachment is another affair, and stands on distinct grounds. These sections provide for two classes of persons. The 32d section gives the short summons to a non-resident, on his making oath and giving security. On this he may proceed by that sort of summons against a resident, or he may take the ordinary summons without oath or security. It is evident, on the face of this section, that the short summons comes exactly in the place of the old plaintiff non-resident warrant, which was taken against a resident for the purpose of tying him up to a short adjournment. Then the option lay between the warrant and the ordinary summons; now comes the 33d section; and by this the short summons is allowed in the place of the old defendant non-resident warrant. Formerly, you never could go against him by summons, but must take a warrant. 2 R. S., 227, § 13. Now you cannot proceed by the old summons; you must take a *short one*. And what renders the identity more striking, this is to be on the same oath and the same security as were necessary to obtain the warrant in the place of which I have supposed the short summons to come. The security is still regulated by the Revised Statutes. 2 R. S., 228, § 17, sub. 2.

Under the old law, any person might have a warrant against a *non-resident*, simply because he was so. The statute here made no distinction. 2 R. S., 228, § 17. So, under the old statute, though you were a non-resident, you might take a warrant against a non-resident, of course. This was your only process. So here you might take a short summons, of course. If the defendant was a non-resident, it never was allowed, under the old law, that you could cut off his right to the usual adjournment, by coming yourself as a non-resident and giving security. That would not help you at all. So here, giving security was a deed of supererogation. The process is founded on the *defendant's* character, not the

plaintiff's. In this case, it could make nothing against the plaintiff, that he applied for process as a non-resident. His own estimation of his character could detract nothing from his legal rights. *Utile per inutile non vitiatur*. The oath of indebtedness and regular security, had it been given, could only be regarded as greater caution. His right to this very summons was perfect without it.

It is clear that a justice cannot, by amending a proceeding in a particular which is necessary to give him jurisdiction, acquire an authority *nunc pro tunc*. But here was no defect. The judgment of the common pleas should be affirmed.

Judgment affirmed.

SUPREME COURT.

GAY v. ROGERS & WAIT.

(3 Cow., 368. Decided 1824.)

AN attorney or other officer of the court is never privileged from arrest when sued with another, though during the actual sitting of the court, and during his attendance at court.

THE defendant, Wait, an attorney and counsellor of this court, attending at this term, was arrested on a bailable *capias*, against him and Rogers, a common person.

S. A. Foot, moved that Wait be discharged.

S. Stevens, contra.

Curia. That statute (1 R. L., 418, § 12) circumscribed the common law privilege to actual term time, during which it is no greater than it was before the statute. Officers of the court were never privileged, when sued with others. The reasoning of the court in *Tiffany v. Driggs*, as to the statute (1 R. L., 387) applies, therefore, to the act (1 R. L., 418, § 12) upon which the defendant moves.

Motion denied.

SUPREME COURT.

TUTTLE v. HUNT.

(2 Cow., 436. *Decided* 1823.)

The plaintiff in a justice's court may serve his own summons, either where he is himself a constable or specially deputed for the purpose.

Admitting evidence of a plaintiff's declaration in his own favor, if objected to, is fatal on error, though the court below direct the jury to disregard it.

ON *certiorari* to a justice's court. The action was trover, in the court below, by Hunt against Tuttle, for a quantity of wheat, which the plaintiff claimed to have levied upon, as a constable, under an execution. The suit was commenced by summons, which was served by the plaintiff himself, and returned thus: "Personally served, August 29th, 1822." Both the service and return were objected to as insufficient, but the objection was overruled. Issue being joined, the cause was tried by jury; and on the trial, the justice allowed the plaintiff's declaration, that he had levied upon the wheat, to be given in evidence, though objected to, but after the evidence was given, he directed the jury not to regard it.

R. Closset, for the plaintiff in error.

H. Baldwin, contra.

Curia. The service of the summons by the plaintiff himself was good. The rule adopted in *Bennett v. Fuller*, 4 John., 486, is this: that where no bail is exacted the sheriff may serve a *capias* in his own favor; and any other plaintiff may, under similar circumstances, be deputed to serve his own process. The return was sufficient. *Legg v. Stillman et al.*, 2 Cow., 418. But the error in admitting proof of the plaintiff's declaration is fatal, though the justice directed the jury to disregard it. *Penfield v. Carpenter*, 13 John., 350.

Judgment reversed.

SUPREME COURT.

GOLD AND SILL, ADS. BISSELL

(1 *Wend.*, 210. *Decided* 1828.)

In justices' courts, where *summons* is the regular process, a *warrant* without oath is irregular and void. The justice has no jurisdiction over the person of the defendant, and all parties concerned in an arrest under such process are trespassers. A warrant without oath, founded on the return of a summons served by copy, issued one year after the summons, is not justified by the statute. The warrant should issue within a reasonable time; and it would seem that twelve days would be considered such reasonable time. Where a plaintiff delayed seventy days in such a case, before he issued a warrant, he was held to be out of court, the arrest under it adjudged unlawful, and an action of false imprisonment sustained against him. A manual touching of the body or actual arrest, is not necessary to constitute an arrest and imprisonment; it is sufficient if the party be within the power of the officer and submits to the arrest. A party in a justice's court is not accountable for the issuing of process, unless he directs and sanctions it. Though a party having a justification will lose his defence by joining in a plea with another not entitled to justify, still a verdict cannot be rendered against him, unless he is proved guilty under the plea of the general issue.

THIS was an action of false imprisonment, tried at the Oneida circuit in October, 1826, before the Hon. Nathan Williams, one of the circuit judges. The declaration was in the usual form; plea, the general issue by the defendants jointly, with notice of special matter. It appeared in evidence, that the defendants presented a note to a justice of the peace, against the plaintiff for collection; that on the 7th July, 1824, the justice issued a summons in favor of Gold & Sill, against Bissell, which was delivered to a constable and returned served by copy. On the 7th July, 1825, the justice issued a warrant in the same suit, on which Bissell was arrested; the arrest was made by a constable calling on Bissell and informing him of the process he had against him. Bissell went with the constable about half a mile, when he procured a person to engage that he would appear before the justice on the next day. On the next day he did appear, and Gold, one of the defendants in this cause, was notified of the fact, and a student in his office, by his direction, attended the trial. Bissell objected that being a freeholder and having a family residing in the county, process of warrant could not legally issue against him without oath being made

in conformity to the directions of the statute, and that the issuing and return of a summons served by copy in July, 1824, did not authorize the issuing of a warrant in July, 1825, as a continuation of the suit. The justice overruled the objection and gave judgment for Gold & Sill. It was further proved, that the plaintiff was a freeholder at the time of the issuing of the warrant, and that it was issued without oath. The justice testified that he could not recollect whether or not Gold & Sill, or either of them, had given him explicit orders to issue the warrant.

The judge ruled that the warrant had been irregularly issued; that the imprisonment was sufficiently proved; that Gold, by appearing, had made the trespass his own; and submitted the question, whether Sill, the other defendant, was guilty or not, to the jury. The jury found a verdict for the plaintiff against both defendants. On application for a new trial, the case which had been made was submitted on written arguments.

S. A. Talcott, (attorney general,) for defendants.

J. A. Spencer, for plaintiff.

By the Court, SAVAGE, Ch. J. A motion is made for a new trial on several grounds. 1. It is contended that the warrant was regularly issued; that the justice having once issued a summons, and that being returned served by copy, he may issue a warrant as a continuation of that suit, at any time during the continuance of his commission. The statute directs, that the first process against freeholders and inhabitants having families, shall be by summons; "but if such summons was not served personally, and the defendant does not appear at the time and place appointed in such summons, nor show good cause for not appearing, then the said justice shall issue another summons or warrant against such defendant at his option. (*Statutes*, 6th vol. c. 281.) In all other cases, a warrant against a freeholder or inhabitant having a family, must be granted upon oath according to the act, except in favor of a non-resident plaintiff.

In cases where summons is the regular process, a warrant without oath is irregular and void. Without oath, the justice has no jurisdiction over the person of the defendant; and all parties con-

cerned in an arrest under such process, are trespassers. If the warrant in this case was issued as a first process in the cause, no doubt it must be held irregular and void; but it is supposed to be justified by the statute, in consequence of the previous issuing and service by copy of a summons. Had the summons been personally served, the plaintiff must, upon the return of it, have taken some further proceeding in the cause, or the cause would have been discontinued; but if the ground assumed by the defendants be correct, after a service of a summons by copy, the plaintiff may omit any further proceeding for twelve months or twelve years, if the justice should remain in commission, and yet the suit continue.

The legislature, I apprehend, never intended to make such a law; nor have they. It is not stated within what time the plaintiff shall be at liberty to proceed by warrant, after the return of a summons served by copy. It may be done, no doubt, as soon as a reasonable time for the defendant's appearance has expired, without an appearance. How long this privilege continues, we can only infer from the policy of the act, and the general course of proceedings before justices.

The defendant is not compelled to appear, though he may do so, upon a service of a summons by copy. If he does not, the plaintiff can compel his appearance by another summons, or be in a situation to take judgment upon personal service. But the legislature seem to have thought that if the defendant did not choose to appear upon service by copy, the plaintiff ought not to be delayed for twelve days longer before he could make any progress in the suit, and therefore authorized the issuing a warrant *instanter*. But if the plaintiff chooses to delay issuing a warrant for twelve days after the return of service by copy, I can see no reason arising out of the statute why he should not proceed again by summons, and the suit be considered a new suit.

It is somewhat singular that there is no reported case deciding how long the privilege of issuing a warrant continues. The practice, I presume, has been to issue the warrant on the day of the return of the summons.

In the case of *Van Rensselaer v. Granger*, decided several terms past, a warrant had been issued on the day when the summons was returned, served by copy, and after the defendant had neglected to appear; and one question was, whether the issuing the summons

or the warrant was the commencement of the suit ; we hold there was but one suit, commenced by the summons and continued by the warrant.

In the case of *Babcock v. Ely*, decided May term, 1825, the question now before the court was considered, and in my judgment decided. In that case Ely had sued Babcock by summons before a justice. The summons was regularly issued, and on the 23d November, 1821, returned, served by copy. On the return, no demand being made for a summons or warrant, the justice, without the knowledge of the plaintiff, supposing the suit at an end, entered under the title of the cause that the plaintiff appeared, but the defendant did not ; and that the plaintiff was indebted for costs, and charged him twelve and a half cents for judgment, and subscribed his name thereto, which was his custom when a suit was disposed of. On the 2d February, 1822, the justice issued a warrant in the same cause without oath, the defendant being an inhabitant, having a family. Babcock sued Ely for false imprisonment, for the arrest upon this warrant, in Monroe common pleas. On the trial in that court the plaintiff was nonsuited, but on error brought to this court we reversed the judgment of nonsuit, holding that the plaintiff before the justice, by his delay, was out of court, and could not legally proceed by warrant without oath. In that case the plaintiff had neglected to proceed for more than two months. Here twelve months exactly elapsed between the issuing of the summons and the warrant. In the former case the justice made an entry showing his understanding that the suit was at an end. No such entry was made in this case. But holding, as I do, that the plaintiff, before the justice, is bound to make his election in a reasonable time, and that no reason can be drawn from the statute for extending that reasonable time beyond twelve days, I do not consider the entry of the justice as material. On this point, therefore, I am of opinion that the issuing of the warrant was irregular and illegal.

2. It is said there was no arrest ; and some cases are cited to show that submission to process without compulsion, is no arrest nor imprisonment. Yet we understand the law to be well settled, that no manual touching the body, or actual force is necessary to constitute an arrest and imprisonment. It is sufficient if the party

be within the power of the officer and submits to the arrest. Such was the fact in this case.

3. The only remaining question is, whether these defendants are liable for the illegal arrest and detention of the plaintiff? The justice issued the warrant; but whether the plaintiffs in that suit, or either of them, gave explicit orders, he does not recollect. He leaves us to infer that he issued the warrant without orders. In *Percival v. Jones* (2 Johns. C., 51), this court said: "While the justice acts ministerially, or as clerk of the party, he will be justified in issuing any process within his jurisdiction, that may be demanded by the plaintiff. But in order to charge the plaintiff in the suit, it should appear that it was really his act. It ought not to depend on the general intendment of the law, that every writ or process is purchased by the party in whose favor it issues. If it appears to be the officious or voluntary act of the justice, without any direct authority for that purpose, an innocent plaintiff ought not to be implicated." So, also, in *Taylor v. Trask* (7 Cow., 249), it was held that a party in a justice's court is not accountable for the issuing of process, unless he directs or sanctions it; and a different relation was supposed to exist between the party and the justice, from that of client and attorney in courts of record.

4. It becomes necessary, then, to inquire whether the plaintiffs before the justice, the defendants here, sanctioned the conduct of the justice in issuing the warrant. Mr. Gold undoubtedly did. When he was notified by the constable, he sent his clerk to attend the trial. The objection was expressly taken on the trial, and opposed by Mr. Gold's agent. But there is no evidence showing any direction by Mr. Sill, nor any approbation subsequently. The verdict against him, therefore, seems to be without evidence. It is urged, however, on the part of the plaintiff, that having pleaded jointly with Mr. Gold, he must share the same fate. There are cases where one defendant by joining in a plea with a co-defendant, loses the benefit of a defence good as to him if pleaded separately; but those are cases of justification, either under a special plea or where a justification may be given in evidence under the general issue. This is not a case where a justification can be proved, unless pleaded or given notice of. So far as his defence consisted of a justification, Mr. Sill must abide the fate of Mr. Gold; but before it is necessary for him to justify, the

plaintiff must show a cause of action upon the plea of the general issue. And it is well settled, that though several defendants plead jointly, one may be convicted and another acquitted. (14 *Johns. R.*, 166.)

I am, therefore, of opinion that a new trial must be granted on payment of costs, unless the plaintiff consents to amend the verdict, by entering a verdict in favor of Mr. Sill.

SUPREME COURT.

PUTNAM v. MAN.

(3 *Wend.*, 202. *Decided* 1829.)

A plaintiff who is a *constable* may serve a summons in his own favor, issued by a justice of the peace; and his *return* cannot be impeached in an action for *trespass* for an arrest under an execution, issued on a judgment rendered on the return of such summons.

If the return be false, the remedy is by action against the constable for a *false return*.

THIS was an action of trespass and false imprisonment, tried at the Saratoga circuit in November, 1827, before the Hon. Reuben Hyde Walworth, then one of the circuit judges.

The false imprisonment complained of was an arrest, on 3d August, 1827, on an execution issued by a justice of the peace, in a suit in favor of the present defendant against the plaintiff, on which he was detained in custody about two hours, when he paid the amount thereof. It appeared in evidence that on the 9th July, 1827, Man being a *constable*, procured from a justice of the peace two summonses in his own favor against Putnam, both returnable on the 21st July; Man called on Putnam and told him he had a summons for him, and showed it to him. Putnam said he was clear of that, he had taken the benefit of the act. Man asked to see the discharge, which was handed to him, and after reading it said the summons was of no use, and added something about letting the suit drop, and handed the summons to the plaintiff. He then went away and returned the other summons to the justice with an indorsement thereon, purporting that it had been

personally served by him on the 10th July, 1827, charging \$1.44 fees, and signing the same *as constable*. On the return of the summons, judgment was rendered by the justice in favor of Man, Putnam not appearing. The execution on which Putnam was arrested, was issued by the justice at the particular request of Man. On the trial of the cause the evidence in relation to the issuing and return of the summons was objected to by the plaintiff, and the evidence relative to the service and what took place at the time thereof, was objected to by the defendant. The evidence, however, was received and the questions of law reserved for the opinion of this court. The judge charged the jury that under the questions reserved they must consider Man as having the right to serve the summons in his own favor; that if they were satisfied that the summons returned to the justice was actually served, the defendant was entitled to a verdict; but if the defendant had served only the summons which he left with the plaintiff, and that it was left with him for the purpose of deceiving him, and that the plaintiff had never seen or heard of the summons which was actually returned, it would be their duty to find for the plaintiff, subject to the opinion of this court upon the questions reserved. The jury found a verdict for the plaintiff, with \$35 damages.

J. Ellsworth, for plaintiff.

M. T. Reynolds, for defendant.

By the Court, SUTHERLAND, J. Two questions arise in this case: 1st. Whether a plaintiff, being a constable, can legally serve a summons in his own favor? 2d. Whether the return upon the summons can be impeached in this action?

The first question was decided in the case of *Tuttle v. Hunt* (2 Cowen, 436). It was there held that a plaintiff in a justice's court might serve his own summons, either where he is himself a constable, or is specially deputed for the purpose, in analogy to the case of a *capias*, where no bail is required, which may be served by the sheriff when he is plaintiff, or by any other plaintiff by special deputation. (4 *Johns. R.*, 486, *Bennet v. Fuller*.)

I am inclined to think the constable's return upon the summons

was not traversable in this action. The return, though false, gave the justice jurisdiction of the person of the defendant; for the act (*Statutes*, vol. 6, 280 c, § 8) provides that the constable serving the summons shall, upon the oath of his office, return thereupon the time and manner of executing the same, and sign his name thereto; and in case the defendant does not appear at the time and place appointed in such summons, and it shall appear *by* the return indorsed thereon, that the summons was personally served, the justice shall then proceed, &c. The return of the constable is the evidence upon which the statute authorizes and requires the justice to proceed. He must, therefore, obtain jurisdiction of the defendant's person by virtue of the return; and the judgment which may be subsequently rendered, will protect the magistrate, the party and the officer who may be instrumental in enforcing it. The constable's return is conclusive against the defendant in the cause in which it is made. He cannot traverse the truth of it by a plea in abatement or otherwise; but if it be false, the defendant's remedy is in an action against the constable for a false return. (*Wheeler v. Lampman*, 14 *Johns. R.*, 481; *Parmington on Small Causes*, 21, 2, 3; *Cowen's Tr.*, 274, 5; *Wilson v. The Executors of Hunt*, 1 *Peters*, 441.)

The want of jurisdiction in a court rendering a judgment, may be shown collaterally whenever any benefit or protection is sought under the judgment. It renders the judgment *coram non judice* and void; and in case of a limited and special jurisdiction, the magistrate and all others concerned in enforcing the judgment would be trespassers. (*Bigelow v. Stearns*, 19 *Johns. R.*, 39; 15 *Johns. R.*, 121; *Elliott v. Pearsall & others*, 1 *Peters' U. S. Rep.*, 340.) But where the court has jurisdiction, and the proceedings are regular on the face of them, trespass will not lie. (1 *Chitty's Pl.*, 184; *Warner v. Shed*, 10 *Johns. R.*, 138; 1 *Wend.*, 126.) That the individual who made the false return was the plaintiff in the suit, cannot, that I perceive, alter the case. The party injured has a perfect remedy by an action for the false return; or, if the defendant acted wilfully and corruptly, he might probably be punished criminally, on an indictment for a misdemeanor. (*Parmington*, 21, 2; *Cowen's Tr.*, 274.)

The defendant must have judgment.

SUPREME COURT.

STORY V. ELLIOT.

(8 Cow., 27. *Decided* 1827.)

An award made and published on *Sunday*, is void.

No judicial act can be done on *Sunday*, at the common law. Other acts are lawful on that day, unless prohibited by statute.

An award is a judicial act.

DEBT on bond for the performance of an award; tried at the St. Lawrence circuit, July, 1824, before NELSON, Ch. Judge.

At the trial it appeared that the award was made and published on *Sunday*. The defendant, therefore, objected that it was a nullity; but a verdict was taken for the plaintiff, subject to the opinion of the supreme court upon the point.

C. P. Kirkland, for the plaintiff.

A. Hackley, contra.

Curia, per SAVAGE, Ch. J. The first section of our statute for suppressing immorality (2 R. L. 193), enacts that there shall be no travelling, servile labor, or working, shooting, &c., on the first day of the week, commonly called *Sunday*. The fifth section enacts that no person, upon the first day of the week, commonly called *Sunday*, shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment or decree, except in cases of treason, felony, or breach of the peace; but that the service shall be void.

Under this act it has been decided, that process cannot be issued on *Sunday*, and that process issued and put into the hands of an officer, is not a commencement of the suit on that day. (12 *John.*, 178.) That a writ of inquiry cannot be executed on *Sunday* (15 *John.*, 179), though a verdict of a jury may be received on that day. (*Ibid.*, and 15 *John.*, 119.) And, carrying the spirit of the statute into the practice of the courts, it has been decided that a notice cannot be served on *Sunday*. (20 *John.*, 140.)

Sunday is stated in all the books, to be *dies non juridicus*; not

made so by the statute, but by a canon of the church incorporated into the common law.

* * * * * *

By the common law, then, it appears, all judicial proceedings are prohibited. All other acts are lawful unless prohibited by statute. Our statute enumerates travelling, servile labor, and working, together with various pastimes; but leaves many acts lawful, which are, notwithstanding, highly offensive to religion and morality. The making a promissory note has been held unlawful in Connecticut (1 *Root*, 474); but in Massachusetts, it is lawful. (10 *Mass. Rep.*, 312.) If a note fall due on *Sunday*, in Connecticut, it must be paid on Monday; in this State, on Saturday, but in neither on Sunday.

The making of an award cannot be included in the terms "travelling, servile labor, or working," and is, therefore, not prohibited by statute. But, in my judgment, it is a judicial proceeding. It is clearly within the terms "*litium et negotiorum*," mentioned in the Constitution of Theodosius.

* * * * * *

I am, therefore, of opinion that the award of the arbitrators was void; being made and published on Sunday. As the case is subject to the opinion of the court, the defendant is entitled to judgment.

Judgment for the defendant.

SUPREME COURT.

REYNOLDS v. ORVIS impleaded with HERRICK.

(7 Cow., 269. Decided 1827.)

Semble that a warrant for the examination of a pauper, under the statutes (1 R. L., 281, § 7,) may be directed to any constable of the county where the pauper resides. But it cannot be executed by a constable of any other town than that where the pauper resides.

Where the justices issued such a warrant, directed and delivered by them to a constable of another town, who arrested and brought the pauper before one of them and another justice; and these two justices examined the pauper, and made an order of removal, which was executed; *held*, that the proceedings were *coram non judice* and void; though no objection was made by the pauper to the informality.

Held, that false imprisonment would lie, in such case, against the justices who issued the process, and delivered it to the constable.

Otherwise, had the pauper appeared voluntarily, and submitted to an examination. Where a statute requires that a certain person shall execute process, and it is executed by another, such a proceeding is void. It gives no jurisdiction; and all the subsequent proceedings upon it are *coram non judice*, and void.

TRESPASS and false imprisonment; tried at the Jefferson circuit, June 25th, 1825, before Williams, C. Judge.

At the trial the following facts were in evidence: The plaintiff was a resident of the town of Le Ray, in Jefferson county, having been assessed and paid taxes there in 1817 and 1821. In June, 1823, Orvis, the defendant, and Hamlin, being justices of that county, issued a warrant directed to any constable of the county of Jefferson commanding him to bring the plaintiff before them to be examined as a pauper. This warrant was delivered by them to a constable of the town of Philadelphia in the same county; who apprehended and brought the plaintiff before the defendants, Orvis and Herrick, the latter also a justice of that county. He was examined by them touching his last place of legal settlement. They made an order to remove him and his two sons from *Le Ray* to *Greenfield*, in *Saratoga* county; and they were removed accordingly from constable to constable, &c.

The plaintiff offered to prove, that on his examination, he stated, under oath, that he had paid taxes two years, but not in succession, in *Le Ray*: and offered other proof of the same facts, which the jus-

tices refused to hear, and decided that he was not settled in *Le Ray*; and could not be legally settled there without owning real estate.

The judge overruled the evidence, and non-suited the plaintiff; and a motion was now made to set aside the non-suit, and for a new trial, on a bill of exceptions containing the above facts.

C. E. Clarke, for the plaintiff.

B. F. Butler, contra.

Curia, per WOODWORTH, J. If this action can be sustained, it must be on the ground that the justices had no jurisdiction of the process, and of the person of the plaintiff. It appears to me the sole question is, whether the arrest and detention, under the process issued to bring the plaintiff before the justices for examination, was not a false imprisonment. After the plaintiff was before them, if he voluntarily submitted to an examination, and the justices erred in the subsequent proceedings, yet, as they then had jurisdiction of the person and subject matter, those proceedings were not void, but voidable; liable to be reversed for error; but not *coram non judice*, so as to lay the foundation for an action of trespass.

The 7th section of the statute (1 R. L., 280, 1), directs that the warrants shall be issued to the constable of the town likely to become chargeable. In this case the warrant was directed to any constable of the county. The direction was more extensive than the statute; but it necessarily included the constables of the town of *Le Ray*; *omne majus in se continet minus*. I rather consider this as surplusage, that might be rejected, had a constable of *Le Ray* served the process. I think it would be a substantial compliance with the act. The statute is explicit that the constable of the town shall be commanded to bring the stranger before the justices, and the justices are authorized to examine every stranger so *brought before them*; and if, *upon such examination*, they shall find him likely to become a charge, they may remove. The right to bring a person for examination is given; the manner that right is to be exercised is prescribed. When a rule is laid down for the government of inferior jurisdictions, we are not at liberty to inquire whether it can be safely departed from; whether the mode pursued

is equally beneficial to the party, as that pointed out by the statute. The answer to arguments of this kind, is, that the law has prescribed the manner in which the person of the pauper may be apprehended. If the appearance of the pauper is not voluntary, jurisdiction of his person can not be acquired, unless the course prescribed is pursued. Here there was no assent, no waiver of the right to question the legality of his caption and detention. He was brought before the justices by compulsion; illegally held as a prisoner, and examined. No question was raised at the time respecting the arrest, or whether he waived any previous irregularity. If it *had appeared*, in the bill of exceptions, that the plaintiff consented to be examined, such consent would only go to warrant the subsequent proceedings. It would leave the question untouched, whether the justices had illegally caused him to be arrested. He cannot be precluded from his action for his illegal imprisonment, unless he voluntarily submitted to it; and waived the irregularity in the process.

In this case, the warrant was delivered to a constable of a different town, not authorized by the statute to serve it. He arrested the plaintiff by order from the justices, and, consequently, if there was no authority, they are trespassers. This part of the case does not implicate Herrick, one of the defendants. He was not one of the justices who issued the warrant. His liability will depend on the regularity of the subsequent proceedings. Without deciding whether it was or was not competent for the defendants to take the examination and make the order of removal, Herrick, not being one of the justices who issued the warrant, it may be observed, that if the opinion expressed as to the apprehension and imprisonment of the plaintiff be correct, it follows that the subsequent proceedings cannot be supported. I admit that, had it appeared that the plaintiff voluntarily consented to be examined, it would not, as to the subsequent proceedings, be material to inquire in what manner the plaintiff came or was brought before the justices. But consent cannot be inferred, when it appears, that, at the time of the examination, the plaintiff was held as a prisoner under an unlawful arrest. His acts are referrible rather to constraint than otherwise.

The subsequent proceedings, then, can only be supported by showing that the previous steps were upon authority of law. The

statute confers the power to remove, if, upon *such examination*, the justices shall find the pauper is likely to become a charge ; that is, upon an examination, had in consequence of the apprehension and bringing the pauper before them, in the manner directed by the act. The statute confers no power to remove upon an examination of the pauper, when it appears that he has been wrongfully imprisoned, and illegally brought before the justices. It is only upon an examination when the pauper is rightfully brought before them. The statute, when speaking in the seventh section, *if upon such examination*, intends that it shall be had, and predicated on the proceedings previously prescribed. If there has been a failure in this respect (and there is no evidence of a voluntary appearance and consent to be examined, which I have no doubt would be within a just construction of the statute), it seems to follow that the order of removal, and the proceedings under it, are void. The doctrine advanced is supported by the case of *Bigelow v. Stearns* (19 Johns., 3). It is there laid down, that if a court of limited jurisdiction issues process which is illegal, or if a court, whether its jurisdiction be limited or not, holds cognizance of a cause without having gained jurisdiction of the person of the defendant, by having him before them in the manner required by law, the proceedings are void.

In that case Chief Justice Spencer observed, "I consider it perfectly well settled, that to justify an inferior magistrate in committing a person, he must have jurisdiction, not only of the subject-matter of the complaint, but also of the process and the person of the defendant."

On these grounds, I am of opinion that the plaintiff is entitled to recover. The nonsuit must be set aside, and a new trial granted, with costs to abide event.

New trial granted.

SUPREME COURT.

J. VAN VECHTEN v. PADDOCK, sheriff, &c.

(12 *John.*, 178. *Decided* 1815.)

Process can neither be executed nor *issued* on a *Sunday*. And where a prisoner on execution, admitted to the liberties of the gaol, went beyond the liberties on a *Sunday*, and the plaintiff, before he returned, on the same day filled up a *capias* against the sheriff for the escape, and delivered it to the coroner, this was held not to be such a commencement of a suit against the sheriff as would prevent his pleading a voluntary return before suit brought.

THIS was an action of debt, for the escape of *Isaac Rathbun*, from the gaol liberties of the county of Jefferson, of which the defendant was sheriff. The declaration was in the usual form. The defendant pleaded *nil debet*, and subjoined to his plea, a notice, that he should give in evidence, at the trial, in bar of the action, a voluntary return of the prisoner within the liberties and custody of the sheriff, before the suit was brought, which notice was verified by an affidavit of the truth of the facts stated in it. It appeared that Rathbun escaped, and went beyond the liberties on Sunday, the 19th September, 1812, and went to Sackett's Harbor, and on the same day, while Rathbun was at that place, and without the liberties, a *capias* was made out and delivered to a coroner of the county, to be served, before he returned into the liberties, which he, afterwards, did on the same day, before the *capias* was actually served on the defendant, and before midnight.

It was agreed, that if the court should be of opinion that the plaintiff was entitled to recover, a judgment should be entered for \$939.28, with a stay of execution for the usual time, for the defendant to collect the amount from the sureties; but if the court should be of opinion that the plaintiff was not entitled to recover, then a judgment of nonsuit should be entered.

A. Van Vechten, for the plaintiff.

Sterling & N. Williams, contra.

THOMPSON, Ch. J., delivered the opinion of the court. The only question in this case is, whether this suit was duly and legally

commenced, so as to preclude the sheriff from pleading a voluntary return. The statute (2 N. R. L., 194) prohibiting the service of process on Sunday, does not, literally, extend to this case. Nor was it necessary that it should; for, according to my understanding of the law on the subject, no process can be legally issued on Sunday. The same principles of policy, as well as of religion and morality, would interdict the issuing as well as the service of process on Sunday. And had not the common law made it illegal, it is most likely that the statute would have also extended to this case. It is a maxim of the law, that Sunday is *dies non juridicus*. And usage, and the history of the law, show that courts cannot sit on Sunday. In *Mackally's case* (9 Coke, 68), a distinction was taken between judicial and ministerial acts. The former, it was said, could not, though the latter might, be performed on Sunday. This case, however, was decided before the statute 29 Car. 1, which made void the service of process on Sunday. In *Becloe v. Alpe* (*Sir William Jones*, 126), it was said by the court, that Sunday was not a *dies juridicus* for the awarding of any judicial process, nor for entering any judgment of record. And the awarding of process, and the giving of judgment, are judicial acts, and therefore cannot be supposed to be done but whilst the court is actually sitting. (3 Burr., 1600.) Hence it is that a writ tested on Sunday is considered void.

In the case of *Taylor and Philips* (3 East., 156), Lord Ellenborough said, the statute, 29 Car., 1, was founded on public policy, and the regularity or irregularity of the proceedings contrary to it could not depend on the assent of the party, or be waived by him. And if considerations of policy are to be taken into view, they will apply with equal force to the issuing of process. For this may, and, indeed, in judgment of law must, necessarily impose upon the officers of the court the duty of keeping their offices open on Sunday. The clerk, if called upon, would be bound to issue the process, and the coroner bound to receive it. For if it is the right of the party to issue process, it is the duty of the officers of the court to lend him their aid, if necessary. If it depends on the will and pleasure of these officers whether they will lend their aid or not, parties may not be placed on the same footing with respect to their remedy against a sheriff in cases like this. Although it has been repeatedly said by this court that the issuing of the

writ is, to every material purpose, the commencement of a suit (3 *John. Cas.*, 146; 1 *Caines*, 71), yet this must be understood as applicable to cases where the writ might be executed, or some efficient act done under it, which could not have been done here, as it is not pretended that it could have been served on Sunday. The court are, therefore, of opinion, that there was not such a commencement of a suit against the sheriff as to deprive him of the defence set up of a voluntary return of the prisoner. A judgment of nonsuit must be entered, according to the stipulation in the case.

SUPREME COURT.

MONEY v. TOBIAS.

(12 *John.*, 422. *Decided* 1815.)

A justice cannot, on his own knowledge, issue a warrant, at the suit of a non-resident plaintiff, without oath.

A written request to the justice, to let the plaintiff have a warrant, and that the party subscribing would be answerable for the cost, is not such security as is required by the statute to authorize the issuing a warrant, at the suit of a non-resident plaintiff.

IN error, on *certiorari* to a justice's court.

Money, the defendant below, was sued by warrant; and when brought before the justice, he inquired whether the plaintiff had made the oath required upon issuing a warrant, according to the statute. The justice answered, that he had not, but that he was satisfied that the plaintiff was a non-resident, without any oath of that fact. The defendant then moved for a nonsuit for that cause, which was overruled. The defendant then objected, that the warrant had been issued in favor of a person claiming to be a non-resident, without giving security according to the statute, and moved for a nonsuit on that ground. The justice said that bail had been given, and produced a paper, on which was written as follows: "Mr. Brock—Please let Mr. Tobias have a warrant, and I will be answerable for the cost. John Holly." The defendant objected to this as insufficient security, but the justice decided that it was legal and sufficient. Issue was joined, a trial had, and judgment given for the plaintiff.

PER CURIAM. The statute is express and imperative, that, in case of a non-resident plaintiff suing by warrant, the fact of non-residence shall be sworn to by the party applying for the warrant; and, also, that a non-resident plaintiff, suing by warrant, shall give security *for the payment of any sum which may be adjudged against him*, as a condition of his right of suing by warrant. (See act, §. 4, with the proviso, vol. 1, 388-9.)

The justice had no right to dispense with the oath, under pretence that he was satisfied of the fact without oath; (4 *John.*, 228) and it is equally clear, that the written memorandum of Holly was not such security as the statute requires. It was a promise to pay the cost of a warrant, without specifying in what suit. The statute requires security, *not merely for costs*, but "for any sum which may be adjudged against the plaintiff."

Besides, the defendant below was unfairly surprised upon the trial, by a very special claim, which the plaintiff did not disclose until the defendant had pleaded and several witnesses had been examined; and which, if it had been stated in proper season, might have induced the defendant to ask for an adjournment, or for a jury. The judgment ought to be reversed.

Judgment reversed.

SUPREME COURT.

VAN SANTWOOD AND ANOTHER v. SANDFORD.

(12 *John.*, 197. *Decided* 1815.)

SPENCER, J., delivered the opinion of the Court. * * *

In the case of *Warren v. Lynch*, 5 *John.*, 244, this court decided that a scrawl for a seal, with an L. S., was not a seal, and deserved no notice; and that calling a paper a deed will not make it one, if it want the requisite formalities. The *oyer* of the contract, therefore, set out in the count under consideration, can have no effect; for we cannot tell that the original differs from it, or possesses any of the properties of a seal.

SUPREME COURT.

ROB AND NEILSON V. MOFFAT.

(3 *John.*, 257. *Decided* 1808.)

Where a writ was served on Sunday, and the sheriff returned *cepi corpus*, on which the plaintiff proceeded and obtained judgment by default and execution, the court ordered all proceedings to be set aside, with costs, on condition that no action should be brought against the sheriff for a false imprisonment.

Root, for the defendant, moved to set aside the judgment and execution in this cause, for irregularity. He read an affidavit, stating that the deputy of the sheriff, to whom the *capias ad respondendum* was directed in the cause, called on the defendant on the Sunday preceding the second Monday of November last, and asked the defendant whether he would consent to a service of the writ on that day, which was objected to; and that no writ was served on the defendant before or after that day; that, supposing the writ would of course be returned *non est inventus*, the defendant paid no further attention to the cause, nor did he know of any proceedings until he was served with an execution.

I. V. D. SCOTT, contra.

PER CURIAM. The defendant may take a rule to set aside the judgment and execution, with costs, provided he stipulates not to bring an action against the sheriff for a false imprisonment.

Rule granted.

SUPREME COURT.

JACKSON *ex dem.* KENYON v. VIRGIL.(3 *John.*, 539. *Decided* 1808.)

If an affidavit begins with the deponent's name, without being subscribed, it is sufficient.

HOPKINS moved for an attachment against the defendant for the non-payment of costs. The affidavit, on which the motion was founded, was not signed with the name of the party, but it was in the usual form, and had the *jurat* of the proper magistrate.

PER CURIAM. As the affidavit begins with the name of the party making it, and appears to have been duly sworn to before a proper magistrate, we think it sufficient. (3 *Caines*, 190; *Haff v. Spicer and Potter*.)

Rule granted.

SUPREME COURT.

BUTLER v. KELSEY.

(15 *John.*, 177. *Decided* 1818.)

A writ of inquiry of damages cannot be executed on a *Sunday*; nor can the jury, who have been impaneled on *Saturday*, and heard the allegations and proofs of the parties before twelve o'clock at night, assess the damages and deliver their verdict to the sheriff on *Sunday*.

* * * * *

THIS was an action of slander, in which the defendant suffered judgment to be entered by default; and, on a writ of inquiry executed before the sheriff of *Dutchess* county, the jury assessed the damages to one hundred and forty-seven dollars.

Bloom, for the defendant, now moved to set aside the inquisition, for irregularity. It appeared from the affidavits which were read, that the execution of the writ of inquiry was commenced before the sheriff and jury, at six o'clock on *Saturday* evening; that

the hearing of the allegations and proofs of the parties, and of the defendant's counsel, detained the jury until half-past eleven o'clock of *Saturday* evening, when the defendant's counsel proposed an adjournment until after Sunday, but the plaintiff's counsel declined an adjournment, not considering the objection to giving a verdict on *Sunday* morning sufficient; that the jury retired to consider of their verdict about one o'clock, A. M., of *Sunday*, and returned their verdict about four o'clock, A. M. of that day.

* * * * *

P. Ruggles, contra.

PER CURIAM. The inquisition ought to be set aside. The writ was executed on *Sunday*, within the meaning of the statute. There was no necessity for taking the inquisition on *Sunday*, as the cause might have been adjourned over until *Monday*. It is not like the case of a trial at a circuit, where the verdict is sometimes taken on *Sunday* morning, because the jury must, otherwise, be kept together during *Sunday*.

* * * * *

COURT OF ERRORS.

MCDUFFIE v. BEDDOE.

(7 *Hill*, 578. *Decided* 1844.)

A bill in chancery was filed setting forth an agreement between the complainant and defendant, by which the former was to purchase of the latter a store of goods, at their original cost prices, and alleging that the defendant fraudulently represented the cost prices to be much higher than they really were, and thus obtained from the complainant a large sum of money beyond what he was bound to pay. The defendant put in an answer, and a decree was afterward made dismissing the bill, with costs, upon which an execution was issued and delivered to the sheriff, and the complainant arrested and imprisoned,—*Held*, in an action against the sheriff for an escape, that the arrest was lawful, notwithstanding the act to abolish imprisonment for debt, and the sheriff therefore liable.

The act to abolish imprisonment for debt does not apply to suits founded in tort, though a contract between the parties is alleged by way of inducement.

The case of *Brown v. Treat*, 1 *Hill*, 225, disapproved. Per Wright, Senator.

Though an arrest is made under a *ca. sa.* regular on its face, but issued on a judgment rendered in a suit or proceeding founded upon contract, the officer may lawfully permit an escape. *Semble*.

ON error from the Supreme Court, where Beddoe brought an action of debt against McDuffie, sheriff of Albany, for the escape of one Webster from the jail limits. The cause was tried at the Albany circuit, in April, 1839, before Cushman, C. Judge, and the facts were these: In December, 1832, Webster and two others filed a bill in chancery against Beddoe, alleging, among other things, that some time in February, 1832, Beddoe, as survivor of the firm of Stafford & Beddoe, being indebted to the complainants in the sum of \$6,500, agreed to let them have the goods in a certain store at Geneva, they to satisfy and discharge their debt, and pay the residue of the purchase money in cash; the goods to be estimated at the prices for which they were originally purchased, adding thereto the expenses of transportation. The bill further alleged that an inventory was immediately made according to prices then rendered and declared by Beddoe to be the original cost prices of the goods, which inventory, adding thereto the expenses of transportation, amounted to about the sum of \$10,000; that the complainants thereupon took the goods, satisfied and discharged their debt against Beddoe, and paid him the residue of the \$10,000 in cash, according to their agreement; and that Beddoe fraudulently concealed from the complainants the original cost prices of the goods, and caused the same to be inventoried at higher prices than he had paid for the same, thereby defrauding the complainants of a large sum of money. The bill prayed for a discovery, and that Beddoe might be decreed to refund the amount which should appear to have been overpaid by the complainants in the purchase of the goods, through the fraudulent misrepresentations set forth; and that the complainants might have such other and further relief as the court should deem meet and proper. Beddoe put in an answer, and a decree was finally made dismissing the bill, with costs, which were afterward taxed at \$270.38. A *ca. sa.* was issued on this decree for the amount of the costs and delivered to McDuffie, who accordingly arrested Webster, and this suit was commenced after he had escaped from the jail limits. The counsel for McDuffie moved for a nonsuit on the ground that

Webster was not liable to imprisonment under the decree in chancery; but the circuit judge denied the motion, and the jury rendered a verdict in favor of Beddoe for \$270.38. A motion was afterward made in behalf of McDuffie for a new trial on a bill of exceptions, which was denied by the Supreme Court, and judgment rendered in favor of Beddoe; whereupon McDuffie sued out a writ of error. The reasons upon which the Supreme Court denied the motion were not set forth in the case.

I. Harris, for the plaintiff in error.

D. Wright, for the defendant in error.

Lott, Senator. McDuffie, the plaintiff in error, was sued in the court below for the escape of John Webster, who was in his custody as sheriff of the county of Albany, under an execution issued out of the court of chancery. The escape was fully proved, and the defence set up was, that the prisoner was exempt from imprisonment, under the act of 1831, abolishing imprisonment for debt. (*Sess. Laws of 1831, p. 396.*) The first section of the act prohibits the arrest or imprisonment of any person on an execution issuing out of a court of equity, "in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract, express or implied, or for the recovery of any damages for the non-performance of any contract." The only question presented, therefore, is, whether the suit in which Webster was imprisoned was founded *on contract*.

The bill, after alleging that a contract was entered into for the sale of a stock of goods by the plaintiff to the complainants, at the original cost prices, with the cost and expense of transportation added, charges that Beddoe did not render in good faith the prices at which he purchased the goods, but that he fraudulently concealed the true cost of the said goods and caused the same to be inventoried at higher prices than he had paid for the same, and thereby defrauded the complainant out of a large sum of money, and therefore prays a discovery, and a decree for the repayment to them of the amount overpaid in the purchase of said goods through the fraudulent misrepresentations of Beddoe.

The gravamen of the complaint in the bill is fraud, and the consequent loss to the complainants resulting therefrom. True, a contract is set forth, but as inducement merely to the subsequent allegations of fraud. No distinct relief is sought to be based on the contract itself. If it had been the foundation of the relief asked it would have been unnecessary to set forth the subsequent allegations of fraud.

It was urged that the object of the complainants was to obtain the re-payment of moneys they had overpaid. If the overpayment had been by mistake, then, indeed, there might be some color for the proposition, for a contract might in such case be implied. But when the relief asked for is on allegations charging bad faith and fraudulent misrepresentations, the whole character of the case is changed.

It was also contended that these allegations were merely formal; and that the same expressions are contained in the ordinary declarations in *assumpsit*. There appears to me to be no analogy between the cases. In *assumpsit*, the ground of action is the contract. The non-fulfillment of it gives the right of action. In this case, on the contrary, as I have attempted to show, the *fraud in fact* of the party is the ground of complaint.

I see no reason, therefore, for the reversal of the judgment.

WRIGHT, Senator. There is nothing in the bill giving color to the objection urged by the plaintiff in error, except that it sets forth an agreement by way of inducement, to show how the fraud was committed. The whole liability of Beddoe is put upon the ground that he fraudulently concealed and misrepresented the actual cost prices of the goods; and the complainants could not have obtained a decree without proof clearly establishing a *scienter* in Beddoe. It is almost the universal practice in courts of law, where you seek to recover for a fraud in the sale or exchange of horses or any other property, to set out the contract or agreement in which the party made the fraudulent statement, or concerning which he fraudulently concealed some material fact. And yet no one has ever doubted that such an action was one clearly sounding in tort, in which the defendant would be liable to be imprisoned for the damages recovered, and the plaintiff be subject to the same liability for the costs, if unsuccessful.

The act to abolish imprisonment for debt was not intended to protect a fraudulent contractor from imprisonment in any case. And in my opinion the supreme court have gone beyond the act in holding that it exempts from imprisonment a party against whom a recovery is had under a declaration containing counts in *assumpsit* and *trover*, where the plea is *not guilty*, and a general verdict rendered upon both. Such is the case of *Brown v. Treat*, 1 *Hill*, 225. I am not willing to extend the act to a case where the whole gravamen of the action is fraud or tort, although the party may set forth a contract as the inducement to his right of action. I think the nonsuit was properly refused by the circuit judge, upon the ground that the suit in chancery was founded wholly in fraud, and that the complainant, Webster, was liable to be imprisoned for the costs. The judgment of the supreme court should therefore be affirmed.

Senators Putnam and Sherman also delivered opinions in favor of affirming the judgment of the supreme court, on the ground that the alleged fraud was the foundation of the suit in chancery, and that the contract was alleged merely by way of inducement.

On the question being put, "Shall this judgment be reversed?" all the members of the court present who heard the argument, twelve in number, voted for affirming.

Judgment affirmed.

SUPREME COURT.

Ex parte BANK OF MONROE.

(7 *Hill*, 177. *Decided* 1845.)

* * * * *

An affidavit made by an agent, should show that he has means of knowledge, and should state facts positively; not according to his *belief* merely.

The affidavit should state in express terms that deponent is agent; merely naming him as such in the affidavit will not answer.

By the Court, BEARDSLEY, J.

* * * * *

The deponent is named in the affidavit as agent, but it omits to state expressly that he was such agent. Then follows a clause

averring that the statement prefixed “exhibits a true and correct account of the amount which will be due upon the said bond and mortgage, on the 14th day of May, instant, over and above all payments, as appears by the books of account of the said trustees, and as this deponent verily believes.”

* * * * *

The present affidavit is defective. It does not appear to have been made by the *agent* of the assignees. Although the deponent is therein named as agent, this is a mere *descriptio personæ*, and there is no oath to the fact of such agency.

Nor is it shown that the person who made the affidavit had any knowledge of the *true* sum due or to become due. He only speaks of what appears by the books, but of the correctness of these he does not profess to have any knowledge. True, he swears to his belief that the sum stated is correct, but this is not sufficient for the purpose.

The affidavit should furnish the best and most satisfactory evidence of what is due.

* * * * *

COURT OF COMMON PLEAS.

JOHN MCCABE v. JOHN DOE, owner of the steamship “Sarah Sands.”

(2 *E. D. Smith*, 64. *Decided* 1853.)

Section 175 of the code, permitting a plaintiff, ignorant of the defendant's name, to designate him by any name, is not applicable to the Marine Court. No suit can be commenced in that court against a defendant under a fictitious name.

When the true name of the defendant has been ascertained, that name should be substituted in the place of the fictitious name.

It is doubtful whether under the act of 1831, an attachment action can be maintained, where the defendant's name is unknown, but if such an action can be maintained, it should appear that the property attached, “belonged to the person charged as defendant under the fictitious name.”

In this action the defendant, after appearing and giving his name, defended, when the judgment rendered against “John Doe,” the defendant in the process was

reversed. *Held*, that the defendant could appeal in his true name, although the judgment was against "John Doe."

George F. Betts and Charles Donohue, for the appellant.

Alanson Nash, for the respondent.

DALY, J. * * * * * *

It is difficult to conceive upon what grounds an attachment could have been issued in the case at all. To authorize the commencement of the suit, it must have been established that a debt was due to the plaintiff by a person whose name was unknown to him, and that that person was about to remove his property from this county, *with intent to defraud his creditors*, or had assigned, disposed of, or secreted it, or was about to do so, with the like intent. (*See § 34 of the act to abolish imprisonment for debt.*) Against this defendant by the fictitious name of John Doe, the plaintiff commenced his suit, and obtained a warrant of attachment, attached the vessel, and has obtained a judgment, under which he would be entitled to issue execution against the property attached. Now there is nothing upon the record to show against whom, in fact, his suit is brought. He might, upon the proof submitted, have obtained a judgment against the members of the Pacific Steamship Company, if he had commenced a suit by attachment against their property and given them notice. It must appear by the judgment, or by the proof upon which it is obtained, that there is some person indebted to him, and he must have attached the property of that person, and taken the steps required by the statute to give him notice of the proceedings against him. Who is that person here? The one to whom the property attached belongs. There is nothing in the case to show to whom the vessel at present belongs, or whether the judgment is rendered against the owner or owners of the vessel or not. If Thompson and Oddie had been inserted in the record as defendants, and the judgment rendered against them, we would have been able to say whether the evidence established a contract on their part against the defendants. The John Doe against whom the judgment is rendered must, if there is any validity in the judgment, represent somebody who made a contract with the plaintiff, or who is liable to him upon a contract. Now, who does he represent? When we

look into the return, we find sufficient evidence to sustain the action against the Pacific Mail Steamship Company. But they are not the parties proceeded against; their property has not been attached. The present owner or owners of the vessel, whoever they may be, are the parties to be affected by the execution to be issued against John Doe; and there is nothing in the case to show who they are, or that they, or any one of them, entered into any contract with the plaintiff. The judgment should, therefore, be reversed, and all proceedings upon the attachment discharged.

INGRAHAM, First J.—The provisions of the Code, section 175, do not apply to the Marine Court, nor is there anything in the statute as to that court allowing a suit to be brought against a person by a fictitious name. The act to abolish imprisonment, &c., authorizing a proceeding by attachment, makes no provision for cases where the debtor's name is unknown, and the proceeding being a statutory one, I very much doubt whether it can, in any event, be sustained against a person under a fictitious name.

The action is to be commenced by an attachment, which is issued on proof to the court that the defendant is a non-resident and is indebted to the plaintiff. How can it be proven that the debtor is a non-resident, without knowing who he is? So, also, the attachment is to be served upon the property of the debtor, and unless so served the owner is not proceeded against legally.

There is, also, a fatal error in the proceeding in not inserting the name of the defendant when he appeared. *A judgment v. John Doe*, when a defendant appears in the court and makes a defence, is a nullity and must be set aside.

There can be no doubt that a person who appears and defends the action in the court below has a right to appeal. If there is a recovery in the court below, it should have been against such defendant, and not John Doe.

Where a proceeding is commenced by attachment against a person by a fictitious name, if such a proceeding can in any case be sanctioned, it should appear on the trial that the property attached belonged to the person charged as defendant under the fictitious name, otherwise there is no evidence of any one having been notified to appear and defend the suit; and where a person claiming to be the owner of the attached property appears and defends, he

is the only person who can be made defendant. If the plaintiff does not deny his ownership of the property on the trial, he cannot object to it afterward on appeal.

It appears to me that this proceeding, throughout, is erroneous, and in no view can it be sustained.

Judgment reversed, and attachment discharged.

COURT OF COMMON PLEAS. ,

CAMP v. TIBBETTS.

(2 *E. D. Smith*, 20. *Decided* 1850.)

An affidavit setting forth upon information and belief that the "defendant is an absconding or fraudulent debtor" and containing no statement of any fact or circumstance whatever, on belief or otherwise, to show the fraudulent intent alleged, is not the "proof" requisite for the issuance of an attachment under the 34th section of chapter 300 of the laws of 1831.

Quære, whether it is necessary to show the non-residence of the defendant upon an application for an attachment under the 33d section of chapter 300 of the laws of 1831.

An appearance in the court below for the purpose of moving to quash the attachment, does not preclude the defendant from objecting to the same upon appeal.

THIS is an appeal from a judgment rendered against the defendant in the Marine Court in an attachment action brought under the provisions of section 34 of chapter 300 of the laws of 1831.

By the Court, WOODRUFF, J. The respondent has, in terms too conclusive to admit of dispute with his adversary, declared the ground upon which the attachments in these cases were issued.

He applied in writing for an attachment, upon "grounds set forth in the affidavit," annexed to his application.

That affidavit declared the grounds of his application to be, an indebtedness to the plaintiff, and that the "defendant is an absconding or fraudulent debtor," and that his property was "being conveyed away with intent to defraud his creditors."

He thus, in terms, declares the grounds of his application to be those specified in section 34th of chap. 300 of laws of 1831.

The process, issued in like unequivocal manner, describes itself

as issued pursuant to the 34th section, upon requisite proof, by affidavit, and the execution of a bond with sufficient surety.

And the justice's return further shows, that it was issued upon the filing of the security and on affidavit, which alone are required or can be deemed to satisfy the requisites of that section.

Entertaining this view of the foundation of this attachment, I am clearly of opinion that there was nothing in the affidavit which could give the Marine Court jurisdiction. Nothing in the nature of proof was offered to sustain the grounds of the application.

Without entering into any discussion of the subject, it is sufficient to say that the affidavit is founded wholly upon information and belief, and contains no statement of any fact or circumstance whatever, on belief or otherwise, to show the fraudulent intent alleged.

The statute allows the plaintiff to make the *proof* by his own affidavit, or by that of some other person. But to hold an affidavit that a third person is informed and believes that the "defendant is an absconding or fraudulent debtor" sufficient, is a perversion of the meaning of the term proof, to which I cannot assent, especially when no evidence (even on information) of any act of the defendant, showing a fraudulent intent, is offered.

This view is sustained by Justice Beardsley, in *Dewey v. Greene*, 11 *Denio*, 93.

I feel much inclined to agree with Judge Beardsley in his opinion in *Taylor v. Heath*, 4 *Denio*, 593, in regard to the necessity of proving non-residence before an attachment could issue under the 33d section of the above act; but the view that I have above taken, sufficiently disposes of the case.

The defendant did not appear in the suit for any purpose, except to move to quash the attachments; and as the summons was not served upon him, no jurisdiction was acquired thereby, and he has in no manner waived the objection to the attachments.

The judgment must be reversed with costs.

NEW YORK COMMON PLEAS, GENERAL TERM, JULY,
1859.

MOTT v. LAWRENCE.

(9 *Abb. Pr. Rep.*, 196.)

In order to obtain an attachment in a justice's court, the affidavit must make out a clear, *prima facie* case. It must satisfactorily appear to the justice that the defendant is about to remove some of his property from the county, with the intent to defraud his creditors. He must be satisfied judicially and upon legal proof. The affidavit must disclose facts from which the legal and logical conclusion would be that the defendant meant to remove his property with the fraudulent intent specified in the statute.

Is the warrant of attachment sufficient where it does not set forth the grounds upon which it was issued?

By the Court, DALY, F. J. The affidavit of the plaintiff was insufficient to warrant the granting of an attachment. The attachment was applied for on the ground that the defendant was about removing all his property out of the city and county of New York, with the intent of defrauding the defendant, who was his creditor, and the only facts sworn to in the affidavit were, that the defendant closed up his place of business on the 21st of October, 1858, and immediately commenced packing up his goods, and continued packing them up until midnight, ready to be removed; that his store was closed on the morning of the following day, before the warrant issued, and that on the preceding day, the twentieth, he removed his family, without informing the defendant or his family, who resided in the same building, over the store. These facts do not show that the defendant was about to remove his property from the county with intent to defraud his creditor. Upon a proceeding of this kind, which a defendant has no opportunity to contest (*Field v. Mc Vicar*, 9 *John.*, 130), but is left for his remedy to the undertaking which the plaintiff gives upon obtaining a warrant of attachment, the affidavit must make out a clear, *prima facie* case. The justice has authority, in the language of the act (*Laws of 1842, ch.*, 107), to grant a warrant for the attachment of the defendant's property, where it shall satisfactorily appear to the justice that the defendant is about to remove any of his property from the county, with the intent to defraud his creditor. It is not

meant merely that the justice shall be personally satisfied, but, in the words of Chief Justice Savage, in *Smith v. Luce* (14 Wend., 237), "he must be satisfied *judicially*, and has no right to be satisfied unless upon *legal* proof." This case affords a good illustration of the necessity of requiring a strict compliance with the statute to prevent an abuse of this process, for the defendant, upon the return of the attachment, offered an affidavit, which the justice could not receive, to show that three or four days before the attachment issued, he had rented a store and dwelling-house in another part of the city, and that he had removed the most of his goods to the store, when they were seized upon the attachment. As the whole proceeding is *ex parte*, and the defendant cannot move to discharge the attachment upon counter-proof, the affidavit must disclose facts from which the legal and logical conclusion would be, that the defendant meant to remove property from the county with the fraudulent intent specified by the statute, and the existence of any such intent, or of a design to remove any property from the county, is not a necessary or presumable legal conclusion from men being engaged in packing up the goods of his store, having the previous day removed his family, which is in substance all that appears by the affidavit. The affidavit, in accordance with the ruling in numerous cases, was wholly insufficient. (*Connell v. Lascelles*, 20 Wend., 77; *Miller v. Brinkerhoff*, 4 Denio, 120; *Matter of Faulkner*, 4 Hill, 598; *Tallman v. Bigelow*, 10 Wend., 420; *Vosburg v. Welch*, 11 Johns., 175; *Brown v. Hinchman*, 9 ib., 75; *Ex parte Haynes*, 18 Wend., 611; *Stewart v. Brown*, 16 Barb., 367; *Staples v. Fairchild*, 3 Comst., 41; *Costellanoes v. Jones*, 1 Seld., 164.)

It is doubtful, moreover, whether the warrant was sufficient, as it did not set forth the ground upon which it was issued; but it is not necessary to pass upon that question.

SUPREME COURT.

WILLIAMS v. BARNAMAN.

(19 *Abb. Pr.*, 69. *Decided* 1865.)

An affidavit setting forth that the defendants are "justly indebted" to the plaintiff "on a demand arising upon keeping their horses," is sufficient to warrant the inference that the demand sued for arose "upon contract, express or implied," and that the statement "justly indebted" in effect describes a demand arising upon contract, for that is the legal import of the term "indebted."

An attachment bond held not defective where, in the body of it, the name of the surety was wholly omitted, but was plainly subscribed for the purpose of becoming surety, and not as a witness, and the justice approved such surety as "the security in the bond."

An attachment bond does not require two sureties; the language of the statute is, "a bond with sufficient surety to be approved," &c.

Where the constable omits to date his return to an attachment, such date may be shown by the oath of such officer, or from the docket of the justice.

The return of an attachment by the officer, which states that the defendant cannot be found in the county, must also state that the copy of the attachment and inventory was left with the person in whose possession the goods were found, or else it will be defective. In a legal sense, property is not attached until all the acts have been done by the officer required by law to constitute a service of the attachment.

The statement of the service of a copy of the attachment and inventory upon the wife of the defendant is not, of itself, sufficient, where he cannot be found in the county; it should also state that she was the person in whose possession the goods were found. *Per* GROVER, J.

THE following opinion was delivered by the justice denying the motion of the plaintiff for a new trial at special term.

Geo. W. Cothran, for plaintiff.

L. L. Lewis, for defendant.

DANIELS, J. The plaintiff moves for a new trial in this cause, upon the ground that the verdict of the jury is against evidence, and also that certain rulings of the court, as to the admission and effect of evidence given by the defendant, were erroneous.

The action was brought to recover for the wrongful conversion of property seized and sold under attachment proceedings insti-

tuted in favor of the defendant against the plaintiff and another, before a justice of the peace in Niagara county, on the ground that the defendants in those proceedings were not residents of that county. Upon the trial, the principal question of fact litigated was whether a demand of the property was made by the plaintiff before the attachment suit was commenced. On that the evidence conflicted. But the preponderance in favor of the plaintiff is not so great as to justify an interference with the verdict for that reason. That was a question of fact for the consideration of the jury; and their finding cannot be disturbed, although the court might deem the conclusion they came to not as fully warranted as a different finding would have been.

The defendants relied upon the proceedings in the attachment suit as a defense to this action; and for that purpose they were proved and read in evidence.

In the affidavit presented to the justice, and upon which the attachment was issued, the defendant swears "that James Williams and Samuel Peters are justly indebted to him on a demand arising upon keeping their horses." This is urged as being so far defective as to prevent the justice from acquiring jurisdiction.

In order to warrant the issuing of an attachment, the statute requires that the demand sued for shall be one "arising upon contract, express or implied," &c. (3 R. S., 462, §§ 212-218.) While it is not specifically stated that the demand mentioned arose upon contract, there is sufficient contained in the affidavit from which that can fairly be inferred. It is stated that the defendants are "justly indebted" for "keeping their horses." In effect, this describes a demand arising upon contract; for that is the legal import of the term "indebted." (3 *Blackstone's Com.*, 154; *Matter of Denny*, 2 *Hill*, 220.) It is sufficient that the affidavit tends to establish such a demand. (*Miller v. Brinkerhoff*, 4 *Denio*, 120.)

The plaintiff also claims that the bond given on the issuing of the attachment is defective for two reasons—first, that it is without a surety; and secondly, that the statute requires two sureties. The body of the bond wholly omits the name of any surety. But the name of C. S. Hawley was plainly subscribed for the purpose of becoming surety, and not for the object of witnessing the execution of it by the plaintiff in the action. The justice so regarded it, and approved of him as "the security in the bond."

The attachment was issued under the non-imprisonment act, which requires that a bond shall be given "with such sureties, and upon such condition, as is required in section twenty-nine" of the article of the Revised Statutes therein referred to. (3 R. S., 5th ed., 463, § 217.) The section thus referred to provides that the "applicant shall execute to the defendant a bond with sufficient surety, to be approved by" the justice. (Ib., 431, § 27.) The section of the non-imprisonment act does not require "sureties" in the bond, but such sureties as are required to justify on attachment under the previous provisions of the Revised Statutes, which do not require sureties, but "sufficient surety." This language is satisfied by one surety with the applicant, who in this case executed the bond.

The remaining objections to the proceedings arise upon the return of the constable to the attachment. He does not state when he served the attachment, and has not dated his return. But the docket of the justice shows that the attachment was returned the same day it was issued. He also swears that such was the fact. This disposes of that objection, for the attachment as a matter of fact must necessarily have been served a sufficient time before the return-day to constitute a compliance with the terms of the statute, as it was returned served to the justice the same day it was issued. But if that had not appeared as a matter of fact, it is at least doubtful whether the objection could now be maintained against the validity of the proceedings. (*Hoose v. Sherrill*, 16 Wend., 34; *Bromley v. Smith*, 2 Hill, 517.)

The constable, in his return to the attachment, states that he "left a copy of the attachment with Barnaman's wife at Martinsville, as the defendants cannot be found in this county." He does not certify that he found the property in her possession, or that he delivered to her an inventory of the property attached. In these respects the return is defective, but whether fatally so when the objection is made against the use of the proceedings in another action, is not entirely clear.

The non-imprisonment act requires the return, "in addition to what is now required," to "state specifically whether such copy (of the attachment) was or was not personally served." (3 R. S., 5th ed., 463, § 218.) This does sufficiently appear from the return made, although it is not so declared in words. It is shown argu-

mentatively ; for as the defendants could not be found in the county, personal service of the attachment could not be made upon them. (*Van Kirk v. Wilds*, 11 *Barb.*, 524-5 ; *Rosenfield v. Howard*, 15 *Barb.*, 546.)

As it was not personally served, and the defendants were not residents of the county of Niagara, it was the officer's duty to leave a copy of the attachment, and of the inventory of the property seized under it, "with the person in whose possession" he found the property. (3 *R. S.*, 5th ed., 431, § 29.) He is also required to make "a return of all his proceedings in writing, subscribed by him, with a copy of the inventory of the goods attached, certified by him." (*Ib.*, 432, § 33.)

This makes it his duty to state in his return, where such is the fact, that he did leave a copy of the inventory and a copy of the attachment with the person in whose possession he found the property. But the statement of these matters in the return of the officer does not seem to be required as the foundation of any subsequent proceedings on the part of the justice, or on the part of the plaintiff in the action ; for the summons, which is the next step in the action, is to be issued when it appears "by the return that property was attached, and that a copy of such inventory and attachment was not personally served." (3 *R. S.*, 5th ed., 463, § 220.) If the defendant does not appear, and those matters are shown by the return, it is the duty of the justice to issue the summons ; and if that is returned, "that the defendant cannot be found after diligent inquiry," then the justice shall proceed to hear and determine the cause.

It will be seen, therefore, from this examination of the statute, that while the officer is required to return all his proceedings, the subsequent action of the justice is made to depend entirely upon two circumstances which must be shown in the return. Those are the attachment of property and the failure to make personal service of the process upon the defendant. The object of the statute requiring the officer to return the other proceedings taken by him under the attachment, must therefore be to supply evidence, under his hand and official oath, that in all the other particulars its terms have been complied with ; for as the return, in other respects than those mentioned, does not constitute the foundation of further proceedings in the action, it merely supplies evidence that the direc-

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tions of the statute, as to the service of the process, have been all observed. If the statute required that the justice should have evidence before him, in the constable's return, that a copy of the attachment and inventory had been left with the person in whose possession the property was found, before he could proceed further with the action, then it would become a matter of jurisdiction, rendering his proceedings, without such evidence, a nullity. But as it does not, such evidence is only important to show that the service made was, in all respects, regular. Where the return of the officer is defective in these respects, the judgment would undoubtedly be reversed upon appeal; for, by the express terms of the statute, the appeal must be heard upon the return of the justice. There is no way of supplying the defects by proof. But where the effect of the proceedings is drawn collaterally into consideration the question of jurisdiction becomes, to some extent, one of fact, which, in many instances, must, in some measure, be determined by evidence. It is not to be supposed that such evidence can be supplied where the law requires a written affidavit of certain facts, or a return in writing of certain matters, as the foundation of the proceeding to be taken; but only where the matters, which it is the duty of the officer to return, are of a collateral nature, constituting evidence of the regularity of the service as distinguished from that which is indispensable to the exercise of jurisdiction. Even in those matters, if the officer certifies them in his return, that is generally conclusive between the parties. It "becomes evidence which the law will not allow to be contradicted. But where that evidence is not furnished by the return, there does not appear to be any well-founded objection to proving it as a fact, where it becomes proper to do so, for the purpose of sustaining the validity of the proceedings." Such seems to have been the opinion of Bronson, J., in the case of *Barnes v. Harris* (4 *Comst.*, 385), and of Allen, J., in *Reno v. Pindar* (20 *N. Y.*, 304).

If the justices proceedings can be maintained without it, then the evidence can do no harm. For it is an error that could not by possibility work an injury to the plaintiff.

The return of the officer on the summons fully complied with the statute. And the additional evidence given by him as a witness, showing its correctness as a matter of fact, though not proper, could do no possible harm to the plaintiff. The evidence given by

the constable showed a proper service of the inventory and copy-attachment upon Barnaman's wife. For that purpose she must be deemed to have the possession of the property kept in her husband's stable, when he is absent from home, as he was in this case. He was an inn-keeper, and she is to be presumed to have charge of his affairs and control of his household during his absence: particularly as no other person was shown to be about the premises actually invested with such charge and control, besides her. (See cases cited in *note 69, part 2, Cow. & Hill's notes, 75.*)

The motion for a new trial must be denied.

The following is the opinion of the General Term upon the appeal of the plaintiff from the order entered pursuant to the foregoing opinion, and from the judgment entered on the verdict.

By the Court, GROVER, P. J. The motion for a new trial upon the ground that the verdict was against evidence, was properly denied. The only material question of fact litigated upon the trial was, whether the plaintiff demanded the horses of the defendant before they were seized by the constable upon the attachment. Upon this the evidence was conflicting, and there was no such preponderance against the verdict as to justify setting it aside upon that ground.

Numerous exceptions were taken to the ruling of the judge in regard to the validity of the attachment, the proceedings preliminary to its issue, and the intermediate proceedings to the judgment rendered by the justice. I shall only examine the exception relating to the return made by the constable, of the service of the attachment, as I think it clear that all the others were correctly decided by the judge at special term for the reasons assigned in the opinion there given—except the one in question, and that relating to the proof given upon the trial, in aid of the return, of what the constable in fact did in serving the attachment. The return is as follows: "By virtue of the within attachment, I have seized and taken the following property — one span of bay horses or ponies; and made and left a copy of the said attachment with Barnaman's wife at Martinsville, as the defendant cannot be found in this county."

The attachment was issued under the provisions of the non-imprisonment act. The 36th section of that act provides that every

attachment issued pursuant to its provisions shall be served in the manner provided for the service of attachments issued pursuant to the provisions of the Revised Statutes ; except that if the defendant can be found in the county, the copy of such attachment and inventory shall be served upon him personally, instead of leaving the same at the place provided by such statute. This return showed sufficiently clearly that the attachment had not been personally served, as it could be legally served in the county only, and the return states that the defendant could not be found therein.

The Revised Statutes (2 R. S., 231, § 31) provide that the copy of attachment and inventory duly certified must be left at the defendant's last place of residence ; or if he had no place of residence in the county, with the person in whose possession the goods are found.

In this case the defendant not being found in the county, and having no place of residence therein, the law requires that the copy of attachment and inventory should be left with the person in whose possession the goods were found. This the return failed to show. By no intendment can it be understood that Mrs. Barnaman had any possession or control of the property attached, or had anything to do with it.

The opinion of the learned justice at special term concedes that the return is defective in this particular, but the judge arrives at the conclusion that these matters need not be stated as the foundation of further proceedings by the justice. This conclusion is based upon the clause of the statute which provides that when it shall appear by the return that the property has been attached, and that a copy of the inventory and attachment were not personally served, and the defendant fails to appear, the justice shall issue a summons, &c. That all the above requisites did appear from the return in this case ; and, therefore, it was held that the justice's proceedings were valid, and constituted a defence to this action.

I am unable to bring my mind to assent to this conclusion. I think the true meaning of its "appearing from the return that property has been attached" is, that the attachment had been served in the manner required by law. In other words, that, in a legal sense, property is not attached until all the acts have been done by the officer required by law to constitute a service of the

attachment. Should a constable simply seize property by virtue of an attachment, and do nothing further by way of completing the service, or attempt to complete it, I think he could not justify detaining the property seized.

This construction secures and effectuates the evident design of the legislature in requiring the service of the inventory and copy of attachment, while the rule adopted at the special term defeats it. That design was to bring notice of the proceedings to the defendant, to enable him to defend against them.

It follows, that the return made by the officer did not justify further proceedings by the justice.

To obviate the difficulty, proof was given by the defendant showing that, in point of fact, the person with whom the inventory and copy of attachment were left had in fact the possession of the property at the time of service. I think the plaintiff's exception to this proof was well taken.

The statute requires the officer to return his proceedings in writing. The authority of the justice depends alone upon this return. He is not authorized to receive any other proofs of the facts. When the proceedings are called in question in any other court, they must be determined by the facts appearing before the justice. No one will question but that this is so upon an appeal from the judgment. If not so when called in question collaterally in another court, it would present the anomaly of sustaining the judgment upon facts into which the justice had no right to inquire, and upon evidence that he was not authorized to receive. Such a rule would lead to much difficulty in determining whether justice's judgments were valid or not. The true rule prevents all difficulty by determining the question by the proceedings before the justice.

The judgment and order appealed from should be reversed, and a new trial ordered, costs to abide event.

MARVIN, J., concurred.

DANIELLS, J., dissented.

COURT OF COMMON PLEAS.

TAYLOR v. BEST and others.

(25 *Eng. L. & Eq.*, 383. *Decided* 1854.)

A councillor of legation of a foreign sovereign having the charge of the executive of the legation, under the direction of the Minister Plenipotentiary, and who, in the absence of the minister, acts as *chargé d'affaires* is "a public minister of a foreign prince" and may claim the privileges of an ambassador.

An ambassador, voluntarily appearing in an action against himself and others as joint contractors, thus submitting to the jurisdiction of the court, cannot have the proceedings set aside, or the action stayed against him, on the ground that he is privileged from suit as an ambassador, where no step has been taken to interfere with his property or person by the plaintiff.

Can an ambassador, *in invitum*, be sued in this country, when process is not against his person or property?

Where the privilege of ambassador attaches, such privilege is not lost by his being engaged in trade.

THE plaintiff in this case is called upon to show cause why all proceedings in this action should not be stayed and set aside, or why the name of Charles Dronet, one of the defendants, should not be struck from the record. The defendant Dronet was sued as one of the directors of "The Royal Nassau Sulphate of Barytes Mining Company." The defendant claims that he is "the duly appointed councillor of legation of his Majesty the King of the Belgians at the Court of St. James's, and that he has full charge of the executive of the said legation, subject to the directions of his excellency, M. Van de Weyer, the minister plenipotentiary, and that in the absence of M. Van de Weyer he is required to act, and has acted, as *chargé d'affaires* to his said Majesty at the said court."

JERVIS, C. J. In this case, which was argued yesterday, the court took time to consider the arguments which were adduced, and having so done, I am of opinion that the rule ought to be discharged. There is no doubt in this case that the applicant M. Dronet, fills the character of minister, to which the privilege contended for attaches; and I think it is equally clear that what has been urged by Mr. Pearson, has no application whatever in a case like this—namely, that if the privilege attach, as it undoubtedly

does attach, to the character of minister, in the case of a minister it is not interfered with or abandoned by the circumstance of trading, as would be the case if the claim was set up in respect of being in the service of the ambassador, within the provisions of the statute. If an ambassador or minister violates the character in which he is delegated to this country, by entering into commercial transactions, that is a question between the country to which he is sent and the country from which he is sent, but he does not thereby lose any privilege to which he may be entitled, the privilege being a general privilege, and the limitation attached to the privilege by reason of trading being confined by the statute of Ann to the case of the servant of the ambassador.

I am reminded that the case reported and referred to—*Barbuit's case*, in the time of Lord Chancellor Talbot—is an authority on that subject. Admitting, therefore, that the applicant is a person entitled to the general privilege, which he has not lost by any trading speculations into which he may have entered, the question is, whether he is entitled, under all the circumstances, to the privilege which he now claims. No case has been cited to show, that not only no process against the person or the goods can be available against the person or goods of an ambassador or minister, but that an application in the present form—namely, an application to stay all the proceeding—is available in the courts of this country.

On the contrary, on an examination of what can be found upon the subject, it would seem that in the case of servants—and the same principle must apply with reference to principal officers—the practice has been, not to stay all proceedings, but to relieve the person of the servant of the ambassador from the vexation of service or of bail; and the applications have hitherto been, so far as I can understand them, to discharge the arrest, where the party has been arrested, on entering a common appearance.

The case referred to in the course of the argument, by my brother Williams, cited in Comyn's Digest, and reported in 2 *Mod.* (which, in fact, is 8 *Mod.*), namely, the case of *Crosse v. Talbot*, 8 *Mod.*, 288, recognizes the old principle. That case was a motion on behalf of the defendant to set aside a bail bond given upon his arrest, and that common bail be accepted for him, and he obtained a rule to show cause; and the rule was ultimately discharged,

upon the ground that he did not bring himself strictly within the privilege as the servant of an ambassador. The court held he ought to be a domestic servant, and really exercise the duties of his office; the being a mere nominal servant was not sufficient; and they discharged the rule; and the reporter adds: "A great many cases have since been determined upon the same principle; but it was in those cases held that the idea of a domestic servant was not confined to his living in the foreign minister's house, provided he is a real servant, and actually performs the service." Therefore, the reporter adds, so far as his knowledge went, that a great many cases had been determined in the form of that application, which application was not to stay all proceedings, but to discharge the bail bond on entering a common appearance, so as to allow the proceedings to go on. I mention this merely, without reference to the general principle of the case, but as to the form of application.

There is no case that has been produced to the court of an application to stay proceedings where the personal liberty of the applicant has not been interfered with; and further, I am aware of no case in which, an action having been brought against several defendants, after the case has advanced, as this has, up to the period of trial, it has been allowed, upon the application of one defendant to stay all proceedings; because, if that were so, it would necessarily follow that all the other defendants would have been put to considerable expense to no purpose, for the proceedings would have to be commenced *de novo*, and what has been expended in the progress of the suit would be utterly useless. At all events, it is sufficient to say, I am not aware, in my practice, of any such application having been made.

But without considering the form of the motion, it seems to me, under the circumstances, that the rule ought to be discharged upon the merits of the case. It is an action against four defendants; the writ is sued out against Dronet as one of the joint contractors. There is no doubt the plaintiff was bound in the first instance to sue all, or he would have been subject to a plea in abatement, and the other defendants would have contested the point of jurisdiction without minding whether Dronet was the subject of the suit or not. The writ being issued, nothing is done to interfere with the free exercise of the minister's functions, or

with his comfort or dignity in this country ; but knowing or apprehending a writ is to be issued, he gives instructions to an attorney in whom he has confidence, to write to the attorney for the plaintiff to ask if a writ is to be issued ; and if it is, then begging that that writ may be sent to him ; therefore soliciting the action against him, and entering voluntarily an appearance ; thus voluntarily submitting to the jurisdiction of the court. Now, it seems to me that, under these circumstances, he cannot now be allowed to complain that a suit has been instituted against him ; and I think, by analogy, if it be necessary, from what has been cited from the various jurists, this proceeding might be sustained.

It is contended, and perhaps it is undoubted, that an ambassador or a minister has a privilege from suit, or at all events from such suits as ultimately result in the taking of his person, or of his goods necessary to his estate or comfort ; and *in invitum* or involuntarily, you cannot compel him to enter into litigation in a country in which he is resident ; but it is admitted by all foreign jurists, that where suits can be founded without attacking the personal liberty or comfort, or interfering with the personal privileges of the individual, you may proceed. And various passages were cited from the works referred to yesterday, to show that, in countries where the civil law prevails, and where you can found your jurisdiction by proceeding *in rem* in the first instance, the action may proceed where there are houses or land that are immovable, and may be taken to found the jurisdiction. So also, where there are movable goods unconnected with the comfort or dignity of the minister, these can be taken to found the jurisdiction, and the suit may proceed. And when you consider what is the effect of the proceedings, and what ultimately may be done if the minister so chooses, there is little distinction between that proceeding and the present ; because, although it is perfectly true that in countries where the civil law prevails, you may proceed by attachment or writ, and thus incidentally establish the means of litigation between the parties without interfering with the person of the defendant, yet if the defendant chooses, for the purpose of protecting his goods, or investigating the question, to appear, his suit, which was originally *in rem*, is converted into a suit *in personam* ; and it is a daily practice in Scotland that goods, which originally were taken for the mere purpose of founding the juris-

diction, have been held as a pledge or security for the fruits of the judgment, if the judgment was ultimately obtained. If, therefore, you have a writ in Holland or elsewhere, and commence your suit by taking goods to found the jurisdiction upon, the minister, if he pleases, may come in and convert the suit into a suit *in personam*, and in that case cannot object to any exercise of authority against him. It seems to be clear from the works referred to, that there seems no distinction between that case and the case at present before us, where the writ is not even served upon the party; where no step is taken which interferes with the dignity of his position, or at all to disturb his comfort; but where merely upon his own application the writ is issued, to which he voluntarily appears, and voluntarily submits to the jurisdiction of the court. It seems to me, on that ground, this rule ought to be discharged.

I am not at all affected by what was urged strongly by Mr. Willes, that this being a privilege of his master or sovereign, it cannot be abandoned; because when you come to examine the authorities referred to on the matter, they are, not that the party may not submit to the jurisdiction for the purpose of having the matter in dispute settled or investigated between the contracting parties, but that the security of the character and the person of the ambassador, or the protection of his goods necessary to his state and comfort, cannot be abandoned by any voluntary act of his own; and by interfering with the person of the ambassador, and taking the goods necessary to his position, you are attacking the privilege of the master who sends him to this country. That is not this case; for aught that appears here, this party was so sued for the purpose of ascertaining the liability of others, he being a necessary party, *non constat*, for aught that appears, anything would have gone on here, except to judgment, for the purpose of enforcing against the other defendants their liability to the plaintiff. If, as the fruits or the result of such judgment, a writ of *fiere facias* or *capias* had been issued to interfere with the goods or person of the ambassador or minister, then the Statute of Anne would have come in, and this court would have interfered. It seems to me, under the circumstances, the court is not called upon to interfere; the party has submitted to the jurisdiction—in fact, has courted it; and therefore cannot have the relief he seeks.

MAULE, J. I think, upon the ground that M. Dronet, who applies for this rule, has voluntarily appeared to the action, and has allowed it to go on to a certain stage, the application cannot be granted without prejudice to the interests of the other defendants, as well as of the plaintiff. On that ground I think this application ought to fail. It is a grave question whether an ambassador or public minister, which M. Dronet undoubtedly is, is so protected by his privilege as that he is not liable to any suit in any matter instituted in the dominions of this country, supposing him to object to the jurisdiction of time and place. That is not decided by any legal determination in this country; nor indeed, as far as judicial determinations go, do we find that it has been so decided elsewhere. With respect to the case of an application for a special remedy being given by the third section of the statute of Anne to servants of a minister or ambassador, where the servant has been sued, there are cases in which he has been discharged upon giving common bail; that seems the extent of relief in those cases that he has asked for, and it has been granted to him; whether, if he had asked for more, it would have been granted, does not appear; probably it would not. But then there is a great distinction between an ambassador and a domestic servant of an ambassador; an ambassador is a person of privilege; the privilege of the domestic servant of an ambassador is the privilege, not of the domestic servant, but of the ambassador; it is (I refer to decisions here—the recent cases clearly show that) because the arrest of the person of the domestic servant of the ambassador might interfere with the comfort and state of the ambassador himself that the servant has the relief; where that is not interfered with at all, then the ambassador is not interfered with by the suit; and the servant's privilege does not extend to such a case, for the servant has no privilege except subordinate to and arising out of the privilege of the ambassador. I think the cases do not determine the point, and it is one fit to be properly and gravely considered whenever the question shall properly arise, whether an ambassador is to be liable to be sued by process not attacking his person, and not attacking his goods, where by such a process he is to be brought into a court of this country unwillingly, and have his rights determined—it may be, to a very great amount, and perhaps even to an interference with his comfort. For a man who has a large and

important lawsuit, cannot stand by and take no care or thought of it, and allow it to be a binding decision upon him ; and, therefore, it is a question whether the privilege is not quite as extensive as Blackstone, J., and some other authorities would show. That is not necessary to be decided here, because, whatever the extent of the privilege may be, I think, in a case where a defendant, who is sued with several other persons, choose voluntarily to appear and to allow the suit to go on to a certain advanced stage, without interposing, and where it does not appear that the plaintiff has any intention to interfere with the person or property of the applicant, but where the suit may be carried out to its full effect, and have entire execution without the defendant being at all interfered with either in person or property, the rule as to the privilege ought not to extend, the privilege of the ambassador having been put an end to by the voluntary act of the defendant under the peculiar circumstances of the case. I therefore agree with the Lord Chief Justice that the rule must be discharged.

CRESSWELL, J., and WILLIAMS, J., concurred.

Rule discharged.

SUPREME COURT.

CLARK v. L. A. G. B. GRANT.

(2 *Wend.*, 257. *Decided* 1829.)

A party attending a reference is entitled to privilege from arrest; but it extends only to a reasonable time after the hearing.

MOTION to discharge the defendant from arrest. The defendant, whose residence is in the county of Orleans, attended a reference in Rochester, in the county of Monroe, in a cause in which he was a party. The hearing before the referees was closed on the *seventh* day of January, and a report was made on the *ninth* day of January, at ten o'clock in the morning. The defendant remained in Rochester to hear the report of the referees, and after it was made, was engaged with his counsel in preparing the necessary papers to set the same aside. At five o'clock, P. M., of the *ninth* day of January, he was arrested on a *capias* at the suit of the plaintiff,

who was the defendant in the cause which had been submitted to reference, and held to bail. He moved to be discharged from the arrest.

By the Court, SUTHERLAND, J. A party attending a reference is entitled to privilege, the same as when attending a trial; but it lasts only during the hearing and a reasonable time after to enable the party to return to his residence. A party might be indulged in remaining to learn the verdict of a jury, who cannot separate, after a cause is committed, until they pronounce a verdict. It is not so with a report of referees. Referees may separate, and a report may not be made until long after the hearing. The party being engaged in preparing to set aside the report, gives him no claim to be exempted from arrest.

Motion denied.

SUPREME COURT.

LODER v. PHELPS.

(13 *Wend.*, 46. *Decided* 1834.)

A *justice of the peace* is not authorized to issue a *warrant* against an inhabitant having a family or against a freeholder, unless the applicant state in the affidavit upon which he applies for such process, *facts and circumstances shewing the grounds of his application*; the mere allegation that he believes there will be danger of losing his debt unless a warrant issues, is not enough.

* * * * *

ERROR from the Monroe common pleas. Loder sued Phelps in an action of assault and battery, and false imprisonment. The declaration contained two counts: in the first the plaintiff charges that the defendant assaulted him, laid hold of him, pulled and dragged him about, and struck him a great many violent blows, and obliged him to go a great distance, to wit, fifteen miles to a certain place, describing it, and there imprisoned him, without any reasonable excuse or probable cause, for a long space of time, to wit, forty-eight hours, &c. The second count was substantially like the first. The defendant pleaded, 1. The *general issue*; 2. A

justification *as to the assault and imprisonment*, under and by virtue of a *warrant* issued by a justice of the peace, under the act giving jurisdiction to justices of the peace in certain civil suits, on the application of the defendant that he would lose his debt unless a warrant was granted to him against the now plaintiff; wherefore the defendant *prayed judgment if the plaintiff ought to have or maintain his action thereof against him, &c.*; and 3. A plea similar to the last. To the two last pleas the plaintiff *demurred*, and to the first took issue. The common pleas adjudged the pleas demurred to, to be good, and gave judgment thereon for the defendant, and the cause went to trial on the issue of fact. On the trial, the arrest of the plaintiff was proved, under a warrant put into the hands of a constable by the defendant. The defendant proved that the warrant was issued by a justice of the peace on his application, and on his making an affidavit before the justice, in these words: "Stephen M. Phelps being duly sworn, deposes and says, that he has, as he supposes, good cause of action against Mitchel Loder, and that he believes there will be danger of losing the said debt or demand, unless warrant issue forthwith." The common pleas charged the jury that the defendant had established his justification, and that he was entitled to their verdict. The jury accordingly found for the defendant; on which verdict judgment was entered. The plaintiff sued out a writ of error.

M. T. Reynolds, for plaintiff in error.

C. P. Kirkland, for defendant in error.

By the Court, SUTHERLAND, J. * * * * *

The *warrant* under which the defendant sought to justify the arrest of the plaintiff was applied for and issued under the act, 2 R. S., 228, § 16, *sub.* 4, which authorizes the issuing of a warrant, notwithstanding the defendant is an inhabitant of the county, having a family, or a freeholder of the same county, if it shall appear to the satisfaction of the justice, by the affidavit of the applicant or of any other witness, that the plaintiff will be in danger of losing his debt or demand unless such warrant be granted. It is, however, provided by § 19 of the same act, "That in all cases upon application for a warrant (except when the suit shall have been com-

menced by summons), the person applying *shall by affidavit state the facts and circumstances within his knowledge*, showing the grounds of his application, whereby the justice may the better judge of the necessity and propriety of issuing such warrant." This section must be construed as qualifying the sixteenth section, and as prescribing the contents of the affidavit, which the applicant shall make when he asks for a warrant. The justice has no right to be satisfied with an affidavit, in the general terms employed in this case; it states no fact or circumstance whereby he could judge of the necessity or propriety of issuing the warrant; without such specification, he had no right or jurisdiction to issue the process; 3 *Cowen*, 206; 11 *Johns. R.*, 175; 12 *id.*, 257; *Cowen's Treatise*, 256; 6 *Wendell*, 438; 6 *Cowen*, 234; and it can afford no protection to the defendant, who was the party who procured it. The court below therefore erred in charging the jury that the defendant had made out a good justification under the warrant. Not only the defendant's special pleas therefore are bad, but the defense failed under the issue of fact, and the judgment below must be reversed.

Judgment reversed; *venire de novo*, &c.

SUPREME COURT.

COMFORT v. GILLESPIE AND OTHERS.

(13 *Wend.*, 404. *Decided* 1835.)

In a proceeding by *attachment* under the act to *abolish imprisonment*, &c., a justice cannot render judgment for a demand exceeding \$50.

The affidavit, on which the application is made for an attachment, must state that the acts charged upon the defendant were done *with the intent to defraud creditors*, and the *facts and circumstances* relied on must be set forth *in the affidavit*; they cannot be supplied by a *verbal* statement.

CERTIORARI to a justice of the peace. A judgment was rendered, by a justice of the peace of Sullivan county, in favor of Gillespie and others, *administrators*, &c., of S. J. Barkley, deceased, against Comfort, for \$60.33, besides \$2.87 costs. By the return to the *certiorari* sued out by the defendant, it appears that the administrators made application in writing to the justice for process by

attachment, and Gillespie, one of the plaintiffs, made an affidavit that the defendant was indebted to the plaintiffs in the sum of \$60.41, over and above all discounts, and that he believed that *Comfort* was about putting his property out of his hands. The justice certified, that in addition to such affidavit, Gillespie stated *verbally*, while under examination at the time, certain circumstances which induced him to believe that *Comfort* intended to put his property out of his hands, to defraud his creditors, such as, &c. ; that such proof being satisfactory to him, he issued an *attachment* against the goods and chattels of *Comfort*. He then set forth the return of the attachment, the proof of indebtedness exhibited before him, and that he rendered judgment for the sums above stated. He also returned that, at the time of the application for the attachment, a *bond*, in the penal sum of \$200, was entered into by Gillespie and another person as his surety, conditioned to pay all damages, &c., to *Comfort*, in case, &c. ; in which bond the attachment was recited to have issued *at the suit of Gillespie alone*, instead of at the suit of Gillespie and others, *administrators*, &c. of *Barkley*.

A. Dimmick, for plaintiff in error.

A. C. Niven, for defendant in error.

By the Court, NELSON, J. The attachment in this case appears to have been issued under the 34th section of the "act to abolish imprisonment for debt and to punish fraudulent debtors." *Statutes, Session of 1831, p. 404*. And it is manifest that the justice exceeded his jurisdiction, as that act fixes *fifty dollars* as the extent of the demands for which justices may issue attachments. Besides the *bond* was defective in not truly setting forth the suit in which the attachment issued, and the *affidavit* was wholly insufficient in omitting to state that the defendant was about to dispose of his property *with the intent to defraud his creditors*, and also in omitting to state *the facts and circumstances* upon which the applicant relied in support of his application. These omissions, it seems, were intended to be supplied by a *verbal* statement of the applicant, which the statute does not authorize.

Judgment reversed.

SUPREME COURT.

IN THE MATTER OF JOHN M. WRIGLEY.

(8 *Wend.*, 134. *Decided* 1831.)

A foreigner, who, after a residence of seven years in this state, transacting business as a commission merchant, returns home, taking with him his effects, *uncertain whether he will return or not*, loses his character of an *inhabitant*; so that though he returns to this state after a sojourning of only three weeks in his native land, he is not entitled to be discharged as an *insolvent debtor*, if after his return he engages in no business and his residence is merely of a temporary character.

In all summary *proceedings* under a statute, although enough is shewn in the institution of them to give jurisdiction to the officer entrusted with the execution of the powers conferred, if in the progress of the case it is discovered that in fact the officer has not got jurisdiction, it is his duty to stop and dismiss the proceedings.

ERROR from the supreme court. Wrigley obtained a discharge from the recorder of New York, as an insolvent debtor, under the act to abolish imprisonment for debt in certain cases. At the time of presenting his petition, an affidavit was exhibited to the recorder that Wrigley was an *inhabitant*, actually residing within the city and county of New York. On the day for the creditors to shew cause, the insolvent was examined as to his *inhabitanacy*, and testified that he was a native of *England*; that he came to New York in 1821, commenced the business of a commission merchant and continued in the same until the autumn of 1827, when he became embarrassed and unable to pay his debts and *determined to leave this country* for England, where his creditors resided. In the *spring of* 1828 he accordingly went to England, taking with him his books of account, it being uncertain *whether he would return or not*. After remaining in England about three weeks, he quit there, leaving his books, and returned to the city of New York on the 12th day of May, *on his way to Canada*, if he should finally conclude to go there. He expected after his return to New York to go to Canada, having prospects of doing a commission business there. On his arrival in this country he took board at Brooklyn, in Kings county, was an unmarried man, was engaged in no particular business, but went to his brother's counting-house in the city almost every day and might have assisted him a little. He

took board at Brooklyn for the purpose of waiting until he should be advised of the return of certain goods which he expected to be consigned to him at Canada. He continued to board at Brooklyn until about the beginning of June, when he was arrested, confined and afterwards admitted to bail. Brooklyn was his home until his arrest, and he intended to go to Canada and reside there. After his arrest at Brooklyn he came to the city of New York, where he was arrested in another suit and bailed, and boarded in New York from that time until he presented his petition to the recorder, on the *seventeenth day of June*. He did not contemplate to go to Canada before July, 1828, and his arrangements as to going there were not of that permanent character that he could not consistently with those arrangements have gone into business elsewhere had a favorable opening presented. The counsel for the creditors objected that Wrigley at the time of presenting his petition was not a *resident* in the city of New York, within the meaning of the act. The recorder decided that Wrigley had never changed his residence in New York, previous to the application to him for an order to shew cause, and that at the time of such application he could not be considered as having a residence within the meaning of the act at any place but New York, and thereupon, after assignment, granted a discharge. The creditors sued out a *certiorari*, removing the proceedings into the supreme court, who gave judgment vacating the proceedings of the recorder, and Wrigley sued out a writ of error. See the opinion of the supreme court, delivered by the chief justice, 4 *Wendell*, 602.

H. Ketchum, for the plaintiff in error.

D. Graham, Jr., for the defendants in error.

The following opinions were delivered :

By the CHANCELLOR. The act to abolish imprisonment for debt in certain cases, under which the plaintiff in error was discharged by the recorder of New York, adopts as part of its provisions the sixth section of the Act of April 12th, 1813, for giving relief in cases of insolvency. 1 *R. L.* 463, § 6. *Laws of 1819, ch. 101*, § 4. That section provides that the insolvent shall make application

in the county of which he is an *inhabitant* or within which he is *imprisoned*; and he is also to make proof of that fact to the officer to whom he presents his petition, before any order is made for notifying the creditors. At the time the petition was presented to the recorder in this case, viz., on the 17th of June, 1828, the insolvent proved to him, by the affidavit of Edward Wrigley, that the petitioner was an inhabitant actually residing within the city and county of New York. This was sufficient to give the recorder jurisdiction of the case, and if nothing further had appeared on this subject, there is no doubt the discharge would have been regular. But on the hearing before the recorder, other facts relative to the inhabitancy of the insolvent did appear, which the supreme court have decided to be sufficient to show that the insolvent was not an inhabitant of the city of New York at the time of his original application to the recorder, and that he was therefore improperly discharged. The questions which now present themselves for our consideration, are, 1st. Whether the creditors had the right to inquire into the fact of the insolvent's inhabitancy, and 2d. If so, whether he was in fact, an inhabitant of New York, within the meaning of the insolvent acts, at the time of presenting his petition.

As to the first point, there is no doubt that the proof exhibited to the recorder at the time of presenting the petition, was sufficient to give him jurisdiction of the case, so far as to protect him and all others acting under his legal orders upon such application; but I apprehend the right of the insolvent to a discharge under the act, does not depend upon his making such proof to the officer, in the first place, as to give him jurisdiction to proceed. In all summary proceedings of this kind, although sufficient is made out to show a *prima facie* case of jurisdiction in the first instance, yet, if the party opposing the application, at the proper stage of the proceeding, shows that the supposed jurisdiction is founded upon a misstatement or misapprehension of the facts, the judge or officer should dismiss the application, and proceed no further in the case. Thus, in the case of a proceeding under the act of the 12th of April, 1813, where the insolvent is entitled to a discharge from his debts, on the petition of two-thirds of his creditors, if the insolvent should present a petition to the recorder, showing that two-thirds of his creditors had joined in the application, and that he had

complied with the other requisitions of the act, the officer would unquestionably have jurisdiction of the case; but if the creditors, at the time of showing cause, could establish the fact that there were other creditors, not named in the inventory, so that in fact two-thirds of the debts were not signed off, or that some other mistake of a similar character had been made, although the officer should be satisfied it was an actual mistake on the part of the applicant, he could not grant the discharge. Before the recorder was authorized to direct an assignment in this case, he must have been legally satisfied that the insolvent had *in all things* conformed to the provisions of the act. One of those provisions was, that the insolvent should make his application in the county of which he was an inhabitant; and if it turned out, on an investigation of that matter, that the insolvent was not an inhabitant of the city of New York, the jurisdiction of the officer to grant the discharge would no longer exist, although he might be satisfied the application was made in good faith by the insolvent, under a belief that he was such an inhabitant within the meaning of the act.

The preliminary proof of inhabitancy required by the statute, is to prevent the abuse of the privilege of applying for a discharge, and to insure a publication of the notice in the proper county, to enable the creditors to be informed of the application; but such *ex parte* proof was never intended to be made conclusive of the fact of inhabitancy within the county. It therefore becomes necessary to examine the question whether the plaintiff in error was in fact an inhabitant of New York at the time of his application to the recorder.

If the legal domicile of the insolvent was in question in this cause, I think there can be no doubt that it was in England—his domicile of origin. He appears to have come to this State in the first place as a mere agent or commission merchant, and probably without any intention of making New York his permanent abode. When he failed in business, he abandoned that city to return to his native country, without having made up his mind ever to come back from England. He subsequently concluded to try his fortunes in Canada, and left his domicile of origin the second time for that purpose. But as he had acquired no new domicile at the time of this application, his original domicile continued. *Inhabitancy and residence* do not mean precisely the same thing as *domicil*;

when the latter term is applied to successions to personal estate, but they mean a fixed and permanent abode or dwelling place for the time being, as contradistinguished from a *mere temporary locality* of existence. In the case of *Rosevelt v. Kellogg*, 20 Johns. R., 210, the Supreme Court decided that the term *inhabitants* in this statute meant the same thing as *residents*. It unquestionably means *incolæ* or sojourners, as distinguished from *advenæ*, transient persons or strangers. Although the plaintiff in error was an inhabitant of New York while he was actually located there and doing business as a commission merchant, yet the moment he broke up his residence and sailed for his native land, *sine animo revertendi*; he was no longer an inhabitant of New York, but he resumed his domicil of origin. *Les Trois Freres, Stewart's Adm. R.*, 6. What then are the circumstances under which he claims to have become an inhabitant or resident of the city of New York in June, 1828? After staying in England a few weeks, without being able to settle with his creditors, he arrived in New York on the 12th of May, on his way to Canada, where he expected to go into the commission business. He took lodgings at a boarding house in Brooklyn, to wait the arrival of the goods which he expected would be consigned to him in Canada. He remained at Brooklyn until the fore part of June, when he was arrested by some of his creditors. He then came over to the city, where he was again arrested and bailed; and he remained there at board for a few days, when he presented his petition for a discharge under the insolvent act. From these facts, I think there is no foundation for a pretense that he was a resident or inhabitant of the city of New York at that time, according to the spirit or intent of this provision in the statute.

I am, therefore, of opinion that the decision of the supreme court was correct, and that the judgment should be affirmed, with costs.

By Mr. Senator ALLEN. A single question arises in this case, viz., was the plaintiff in error an inhabitant of the city of New York within the meaning of the statute? The provision of the act is, that every person applying for the benefit thereof shall make application in the county of which he or she may be an *inhabitant*, or wherein he or she may be *imprisoned*, and not else-

where. An *inhabitant* is defined to be a householder in a place, as inhabitants in a vill are the householders in a vill. The word *inhabitants* includes tenants in fee simple, tenants for life, tenants at will, and he that has no interest but his habitation and dwelling. He who hath a house in his hands in a town may be said to be an inhabitant. *Jacob's Law Dict., tit. Inhabitants.* The plaintiff in error certainly was an inhabitant of the city of New York while he transacted business there from 1821 to 1828; but, on his leaving the United States for England, his native place, uncertain whether he would return or not, it is a question whether he did not, on his arrival in England, resume his residence there, and annul his residence in the United States. In the case of *Harvard College v. Gore*, 5 *Pick.*, 379, Chief Justice Parker held that the constitutional definition of *habitaney* is the place where a man dwells or has his home; in other words, his domicil; an actual removal into another town, with an intention to become an inhabitant, made him one. The plaintiff returned to the United States in May, 1828, on his way to Canada, where he had prospects of business, and he took board in Brooklyn, Kings county, waiting for advice of goods, which were to have been consigned to him at Canada. He was not, therefore, an inhabitant of New York during this period; but, if an inhabitant of any part of the United States, it was of Brooklyn. I doubt, however, whether he could even be considered an inhabitant of Brooklyn, in the sense intended in the above case, it not appearing to be his intention to make that his place of residence, as he was only there temporarily, waiting for advice of the goods expected to arrive at Canada, where he intended to go and reside.

In *Guise v. O'Daniel*, 1 *Binney*, 349, Judge Rush, in delivering the opinion of the court, observed that the apparent or avowed intention of constant residence, not the manner of it, constituted the domicil. It may be defined to be a residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time. And, in the case of *The Inhabitants of Turner v. The Inhabitants of Buckfield*, 4 *Greenleaf*, 231, the question was, what is meant by being resident in a particular town? The court held that, by the words *dwells* and *has his home*, the legislature meant to designate some permanent abode or residence, with an intention to remain, or at least without an intention

of removal. The plaintiff, after his arrest, imprisonment, and being bailed in the county of Kings, came to New York, where he was again arrested; and, from early in June to the time of his application for the benefit of the insolvent act, which was on the 17th of June, he boarded in New York. It appears, therefore, that, at the most, he could have resided in New York only about two weeks after his return to this country and before applying for his discharge under the act; and, if intention is to govern, and all the cases seem to decide that it is, then it is evident from his own testimony that it was not his intention to make any other place than Canada his permanent residence.

The case of *Cotton v. Gladding*, 4 *Mason*, 308, is in point. Gladding was a native of Rhode Island; he was a young unmarried man, and was in business in New York for some years, when his house failed; after which occurrence he removed to Rhode Island and resided with his mother. At the time of prosecution he was engaged as a clerk in a store of his brother in Connecticut, but occasionally visited his mother; there was no act showing his intention of a permanent residence in Connecticut. Judge Story held that he was a citizen of Rhode Island; his birth was in that State. While in New York in business, he may be deemed to have acquired a citizenship there, as he probably intended a permanent residence; but when the house failed he gave up his residence in New York and returned to his mother's family; under such circumstances he must be presumed to have regained the family domicil, and to have returned to his native allegiance. Upon his return from New York he reacquired his native citizenship. What evidence is there that he has since changed it? It does not appear that he had any intention of becoming a citizen of Connecticut; for aught in the case, his engagement may have been merely temporary, until he could get other business, and without any intention of changing his domicil. The case might have been different if he had had a family and removed with them into Connecticut; such an act would afford *prima facie* evidence of a change of permanent domicil. There is some similarity between the above case and the one under consideration. Both parties were natives of places foreign to that where they were arrested; both were unmarried men; both were in business in New York for some considerable time; both failed in busi-

ness there; both, after the happening of this event, returned to their native place. At the time of arrest in New York, one was occasionally assisting in his brother's counting-house; the other at the time of arrest, in Connecticut, was engaged as a clerk in his brother's store, and there was no act showing that either intended a permanent residence.

I am therefore of opinion, from the best consideration I have been enabled to give the case, that the plaintiff in error was not an inhabitant of the city of New York in the sense intended by the legislature, and that therefore the judgment of the supreme court ought to be affirmed.

On the question being put, *Shall this judgment be reversed?* *four* members expressed their opinions in the affirmative, and *fourteen* in the negative. The members who expressed their opinions in the affirmative were, Senators Fuller, Lynde, Warren and Westcott.

Whereupon, the judgment of the supreme court was *affirmed*.

SUPREME COURT.

PULLING v. THE PEOPLE.

(8 *Barb.*, 384. *Decided* 1850.)

By the method of computing time in this State, established by the Revised Statutes, a day consists of twenty-four hours, and commences and ends at midnight.

Whenever, therefore, a statute forbids an act to be done on a particular day, it has reference to this mode of computation by the calendar; unless there is some express declaration to the contrary.

Accordingly, where a cause pending before a court of special sessions was submitted to the jury at two o'clock in the morning of *Sunday*, and the jury rendered their verdict about three o'clock; *held*, that the conviction was erroneous, and it was reversed.

* * * * *

CERTIORARI to a court of special sessions held by William Easterly, Esq., a justice of the peace of Saratoga county, to remove

a conviction for petit larceny. The facts are set forth in the opinion of the court.

W. T. Odell, for the plaintiff in error.

J. Lawrence (district attorney), for the people.

By the Court, WILLARD, J. The defendant was tried before a court of special sessions, in December, 1848, held before a justice and a jury, for the crime of petit larceny. The trial was commenced on the 30th of December, and the cause was submitted to the jury at two o'clock in the morning of Sunday, the 31st of December. The jury rendered their verdict about three o'clock in the morning, finding the defendant guilty. The justice took a recess until Monday morning, and then pronounced judgment on the verdict. The error complained of is that the court was held open on Sunday. The statute is in these words (2 R. S., 275, § 7): "No court shall be opened or transact any business on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury; and every adjournment of a court on Saturday to another day shall always be to some other day than Sunday, except such adjournment as may be made after a cause has been committed to a jury. But this section shall not prevent the exercise of the jurisdiction of any single magistrate, when it shall be necessary in criminal cases, to preserve the peace, or to arrest offenders." The question is, what period of time is meant in the foregoing section by the term Sunday. Coke says, that at common law the day is divided into the *natural* and the *artificial* day—the natural consisting of twenty-four hours, and the artificial of the space intervening between the rising and setting of the sun. Different nations began the day at different times. The Jews, Chaldeans and Babylonians began the day at the rising of the sun; the Athenians at the fall; the Umbri of Italy at midday; the Egyptians and Romans from midnight. (Co. Litt. 135, a, b.) The law of England in many cases follows the Roman in this respect; and for certain purposes, also, it regards only the solar or artificial day. (Ib.) The same is true likewise of the laws of this State. By the common law all judicial proceedings are prohibited on Sunday. (8 Cowen, 30, per Savage, Ch. J.; Johnson v. Day, 17 Pick., 109, per

Wilde, J.) The trial of a cause is a judicial act; no part of it can be had on Sunday, except what is specifically allowed by the statute, namely, the receiving of the verdict.

It is insisted by the public prosecutor, that the statute has regard only to the solar, or artificial day. This question must be settled by reference to our own statutes, and the usage of our own courts, as our sister states have adopted different regulations on this subject. The 19th chapter of part one of the Revised Statutes, title 1, "of the computation of time," enacts that time shall continue to be computed in this State, according to the Gregorian, or new style, and the first day of January shall be reckoned the first day of the year. It enacts that whenever the term year is or shall be used in any statute, deed, contract, &c., it shall be intended to consist of three hundred and sixty-five days, the added day of leap year and the day preceding to be reckoned together as one day, and the term month shall be construed to mean a calendar month and not a lunar month. According to this division of time, a day consists of twenty-four hours, and commences and ends at midnight. Whenever, therefore, a statute forbids an act to be done on a particular day, it has reference to this mode of computation, by the calendar, unless there is some express declaration to the contrary. The act for suppressing immorality, of 23d Feb., 1788 (2 Greenl., 89, 90, § 3), forbade the service on Sunday of any writ, process, warrant, order, judgment or decree (except in case of treason, felony and breach of the peace), and declared such service to be void. This section was continued in the revised acts of 1813. (2 R. L., 103, 105.) Under this latter statute it was held, in *Butler v. Kelsey*, 15 John., 177, that an inquisition taken before a sheriff when the cause was submitted to the jury about one o'clock in the morning of Sunday, and the verdict found about four, was void, and they accordingly set it aside. The court said it was executed on Sunday, within the meaning of the statute. They distinguished the case from that of *Houtaling v. Osborn* (15 John., 119), where a verdict was allowed to be taken on Sunday, the cause having been submitted to the jury on Saturday. These cases are cited with approbation by the court in *Story v. Elliott* (8 Cow., 28), where it was held that an award cannot be made on Sunday. In *Field v. Park* (20 John., 140), the service on Sunday of a notice and affidavits, as the foundation for a motion, was

held irregular as being within the spirit of the act. In *Taylor v. Phillips* (3 *East*, 155), a *latitat* was set aside, as irregular, because served on Sunday. Lord Ellenborough considered such service as forbidden in effect by 29 Ch., 2, ch. 7, § 6, of which a former statute was a transcript. It does not appear on what hour of the day the service was made either in *Field v. Park* or *Taylor v. Phillips*. It is therefore fairly inferable, that the service would be void if made on any part of the natural day.

The foregoing cases from our own reports were prior to the revised statutes. It is presumed that if the legislature had intended to restrict the prohibition with regard to judicial proceedings on Sunday, to the artificial day between sunrise and sunset, they would have said so, in revising the law, in terms that could not be mistaken. As the statute now stands, it clearly relates to the whole natural day. In *Vandenwerken v. The People* (5 *Wend.*, 530), the question arose under the revised statutes, on a *certiorari* to a court of special sessions. The justices held their court open from Saturday till Monday, for the return of a second service, and this was complained of as a violation of the statute. But the court held, that merely continuing the cause over Sunday, *was not opening a court to transact business on Sunday*, within the meaning of the act.

The cases referred to from our sister states were all based upon the local law. Thus in *Fox v. Abel*, 2 *Conn. Rep.*, 541, while it was conceded that at common law the natural day extends from midnight to midnight, yet it was decided by a majority of the court, that their statute, prohibiting the service of process on the Lord's day, had reference only to the *solar day*. This opinion was based upon the peculiar phraseology of some of the sections of the act. So, in Massachusetts, in *Johnson v. Day*, 17 *Pick.*, 106, a writ of attachment issued on Sunday after sundown, was held regular, because their statute of 1791, ch. 58, limited the time which its prohibition extended, to the time included between the midnight preceding and the sunset of the same day. In like manner the statutes of Vermont (Laws of Vt., 394, 395), for some purposes consider the Sabbath as beginning at sundown on Saturday, and terminating at sundown the next day, and for other purposes as continued till midnight; and it expressly forbids the service of process between Saturday at sundown and twelve o'clock at night

on Sunday, except in cases of treason, felony and breach of the peace, and in favor of bail apprehending their principal. (R. L. of Verm., 184, § 39.) In New Hampshire, the Supreme Court held, in *Shaw v. Dodge*, 5 *N. Hamp. Rep.*, 462, that a service of civil process upon the Lord's day was under their statute, illegal, and that the day, within the meaning of that act, included the twenty-four hours, beginning and ending at midnight.

The common law, it is said by *Coke (supra)*, sometimes regards the solar day. Our own statutes sometimes adopt the solar day and sometimes only a part of it. Thus, at common law, a distress for rent service must be made in the *day* time and not in the night. (Co. Lit., 142; 3 Bl. Com., 10, 11.) And a demand of rent, in order to enforce a forfeiture, must be made a convenient time before *sunset*. (Id. 202, a.)

In the act respecting elections (Laws of 1842, 109, 118) the election is to be held but one *day*; and by § 6 of art. 1, the poll is required to be opened in the cities at sunrise, and in the several towns, at any time between sunrise and nine o'clock in the morning, and to be kept open till the setting of the sun. Hence the *day* for voting is the *artificial* day. By the 4th section of title 1, no civil process is permitted to be served on any elector entitled to vote in such city or town, on the *day* on which such election shall be held. And by the 5th section, no court shall be opened or transact any business in any city or town on the day such election shall be held therein, unless it be for the purpose of receiving a verdict or discharging a jury, or the naturalization of foreigners; and every adjournment of a court in such city or town *on the day next preceding* the day any such election shall be held therein, shall always be to *some other day than the day of such election*, except such adjournment as may be made, after a cause has been committed to a jury. These sections obviously relate to the natural day. In the act relative to executions upon property (2 R. S. 369, § 36), the sale of real and personal property by virtue of any execution is required to be between nine o'clock in the forenoon and the setting of the sun. The code fixes the time for the service of papers in certain cases between the hours of six o'clock in the morning and nine o'clock in the evening. (Code, § 409.) And there are numerous other statutes, as well as usages, which fix particular hours in the day, within which certain acts must be done. The

fact that such statutes have been adopted, affords evidence that the acts limited to be done on the solar day, might be performed on any portion of the natural day, were it not for legislative interference.

* * * * *

We entertain no doubt that the conviction was wrong, for the error of submitting the cause to the jury on Sunday morning, and that the conviction should be reversed.

Conviction before special sessions reversed.

SUPREME COURT.

MILLARD v. CANFIELD.

(5 *Wend.*, 61. *Decided* 1830.)

A *constable* is not authorized, on an arrest by virtue of a civil warrant in a civil cause, to take security for the appearance of the defendant.

Where such security was taken, and \$40 was deposited with the bail for his indemnity, and the money, by the connivance of the bail with the creditor, was levied upon by virtue of an execution, *it was held* that an action of *trover* for the money might be sustained by the depositor against the bail after demand and refusal.

ERROR from the Onondaga common pleas. Canfield sued Millard in an action for *trover* for \$40 in bank bills. The facts were these: Canfield was arrested by a constable on three warrants issued by a justice in civil suits commenced against him; Millard became bail to the constable that Canfield would appear before the justice on a certain day, and stand trial in the three suits; and to indemnify Millard for thus becoming bail, Canfield put into his hands \$40, to be returned to him if he complied with the engagement entered into by Millard. After two of the suits were tried, Canfield demanded the money of Millard, who refused to deliver it up, and a second demand was made after the third suit was tried. After the trials, Millard went with a plaintiff in one of the suits to the store of such plaintiff, and there took from his pocket a wallet containing the money received by him of Canfield, and laid the same on the counter, where it was levied upon by the constable

who had served the warrants, by virtue of an execution. The evidence furnished strong presumption of connivance between the creditor and Millard, though the constable denied connivance. The court charged the jury that the contract between Canfield and Millard was void, and that Canfield had a right to the money at any time when demanded, even though such demand had been made prior to the time when Canfield had agreed to appear before the justice; and even if Millard had a special interest in the money, such money could not be levied on by virtue of an execution against Canfield. The jury found for the plaintiff; on which verdict judgment was entered.

J. A. Spencer, for plaintiff in error.

C. P. Kirkland, for defendant in error.

By the Court, SAVAGE, J. The act authorizing the proceeding by warrant does not justify the officer in taking security for the appearance of the defendant. It is the officer's duty to take the defendant forthwith before the justice. He has no right to take security; and such security, if taken, is void. The law looks with jealousy upon officers taking securities in their official character, when not warranted by law. 7 *Johns. R.*, 426; 8 *id.*, 100. The undertaking of Millard to the constable being void, there was no consideration for the deposit of \$40. Canfield was entitled to it at any moment, and the defendant Millard ought to have returned it to him when demanded; his refusal to do so was a conversion. Whether the money could be levied on is a question not necessary to be decided in this case. There is strong reason to believe there was connivance between the creditor and Millard, though the constable denies it; but whether so or not is immaterial. There was a conversion of the money, and the plaintiff below rightfully recovered. Judgment affirmed.

SUPREME COURT.

HUMPHREY v. CUMMING, gent., one, &c.

(5 Wend., 90. Decided 1830.)

A *counsellor*, actually attending court for the purpose of making a special motion, if arrested on a *ca. sa.* during his attendance, will be discharged from the arrest. The application for the discharge is *ex parte*. Notice need not be given to the attorney of the party suing out the execution.

The rights of the party suing out the execution are in no respect prejudiced by the discharge. After the privilege ceases, the same writ may be served, or a new execution may be issued.

MOTION to vacate a rule discharging the defendant from arrest on a *ca. sa.*

By the Court, SUTHERLAND, J. This is a motion that the rule entered on the 6th of August last, discharging the defendant from arrest on a *ca. sa.* issued in this cause, be vacated, and that the sheriff of Albany county be authorized to retake the defendant on the same *ca. sa.*, or if he cannot be arrested thereon, that the plaintiff have leave, after the return day thereof, to issue a new execution, either against the person or property of the defendant.

The defendant was properly discharged from arrest. It was shown that he was actually attending court for the purpose of making a non-enumerated motion, and that his personal attendance was deemed necessary to the interest of his client.

The case of *Secor v. Bell*, 18 Johns. R., 52, shows that it is the established practice of the court to discharge an attorney or counsellor from arrest upon a *ca. sa.* under such circumstances, and that a judge at *nisi prius* has the same authority. The plaintiff's rights are in no respect prejudiced by the discharge. The defendant, after his privilege has terminated, may be retaken upon the same writ, or a new execution may be issued, according as the circumstances of the case may require. The parties stand precisely in the same situation as though the defendant had never been arrested.

The application for the discharge is necessarily a summary one. If notice were required to be given, the privilege would be of no value either to the attorney or his client. The rule discharging

the defendant from arrest having been properly granted, and the plaintiff having the right to retake the defendant upon the same execution, or to issue a new execution, at his option, this application was entirely unnecessary, and must be denied, with costs.

SUPREME COURT.

MAXSON v. ANNAS.

(1 *Denio*, 204. *Decided* 1845.)

The act in relation to the seventh-day baptists (Stat. 1830, p. 335) which prohibits the *service and execution* of all writs, process, warrants, orders, judgments, &c., on *Saturday*, upon any person who keeps that day as the sabbath, and declares that such service shall be void, does not affect a judgment *rendered* against such person on that day.

TROVER for a wagon and cutter tried at the Madison circuit before Gridley, C. Judge, in September, 1843. The case, as stated by the plaintiff's counsel in his opening to the jury, was this: The plaintiff is a seventh-day baptist, whose religious faith and practice is to keep the seventh as a day set apart by divine command as the sabbath of rest from labor, and dedicated to the worship of God: the defendant held a note against the plaintiff, upon which he commenced a suit in a justice's court by summons, returnable on the 17th day of December, 1842, that being the seventh day of the week, commonly called Saturday: as that day was the plaintiff's sabbath he did not appear, though he had a good defense to the whole or a part of the note. On that day a trial was had in the absence of the plaintiff, and a judgment rendered against him for damages and costs. An execution was afterwards issued on the judgment, by virtue of which the property in question was levied upon and sold. The defendant purchased the property at the sale, and converted it to his own use. The defendant knew that the plaintiff was a seventh-day baptist, and that it was his faith and practice to keep the seventh

day of the week as his sabbath. On this opening the plaintiff was nonsuited; and he now moves for a new trial on the case.

Z. T. Bentley, for the plaintiff.

W. J. Hough, for the defendant.

By the Court, BRONSON, Ch. J. The plaintiff insists that the judgment under which the defendant purchased the property is void, because it was rendered on Saturday; and he relies on the statute "in relation to the seventh-day baptists." This badly drawn law provides, in substance, that no writ, process, warrant, order, judgment, decree or other proceeding of any court, shall be *served* or *executed* on the seventh day of the week, commonly called Saturday, upon any person who keeps that day as the sabbath. Cases of breaches of the peace, and the apprehension of persons charged with crimes and misdemeanors are excepted. "The *service* of any such proceeding, in all other cases, shall be utterly void." (*Stat.* 1839, p. 335.) This statute, except as to the day, is much like the one which provides, that no writ, process, &c., shall be *served* or *executed* on Sunday (1 *R. S.*, 675, § 69); and both should receive the same construction. But I am unable to read the law so that it will touch the plaintiff's case. His complaint is, that the judgment was *rendered*—not that it was "served or executed"—on Sunday. The rendition, is a very different thing from the execution, of a judgment. We have been referred to two classes of cases; one relating to ministerial, and the other to judicial acts. The first class arose under the Sunday statute; the second had nothing to do with it. In *Butler v. Kelsey*, 15 *John.*, 177, which belongs to the first class, it was held that a writ of inquiry of damages could not be *executed* on Sunday. It was a plain case, falling within the very words of the statute. In *Field v. Park*, 20 *John.*, 140, it was held, that a notice of motion is, in effect, a *summons* to appear in court and defend against an order to be applied for; and cannot, therefore, be served on Sunday. *Van Vechten v. Paddock*, 12 *John.*, 178, decides, that delivering process to an officer on Sunday, is not a good commencement of an action on that day. The cases of the other class hold, that, *at the common law*, Sunday is *dies non juridicus*, and that a judg-

ment cannot be rendered, or an award be made on that day. (*Hotailing v. Osborn*, 15 *John.*, 119; *Story v. Elliott*, 8 *Cowen*, 27.) We have now a statute declaring, that no court shall be opened, or transact any business, on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury." (2 *R. S.*, 275, § 7.) We have no such statute in relation to *Saturday*; nor has the common law decided that Saturday is not a judicial day. No act is void because it was done on the sabbath, unless it has been prohibited by the common law, or by statute. (*Sayles v. Smith*, 12 *Wend.*, 57.) The same doctrine must apply to all the other days in the week.

If the plaintiff had the process made returnable at a time when he knew the defendant could not conscientiously attend to make his defence, he is worthy of the severest censure. But still the judgment is not void. There are many social duties which are not enforced, and many wicked deeds which are not punished, by human laws.

New trial denied.

SUPREME COURT.

TRAVER v. NICHOLS.

(7 *Wend.*, 434. *Decided* 1831.)

The security given by a *non-resident* plaintiff, on obtaining a warrant from a justice of the peace, extends to the final determination of the cause, when carried up by *appeal* to the court of common pleas; so that the *surety* is liable for the *costs of the appeal*, if adjudged against the plaintiff.

DEMURRER to declaration. The declaration is in *covenant* on an instrument under seal, executed by the defendant on the issuing of *warrants* by a justice of the peace in several causes, in favor of several *non-resident* plaintiffs against Traver, the plaintiff in this cause, whereby the defendant bound himself to pay Traver any sum which might be adjudged *against the plaintiffs in the afore-said suits*. The plaintiff avers that judgments were rendered against him before the justice in favor of the plaintiffs in three of the suits; that he appealed to the common pleas of Cayuga, and

that in that court *costs* were adjudged to him, expended by him about his defense in the said causes, amounting in the aggregate to \$51.70, and that the same remained unpaid. The defendant *demurred*.

J. A. Spencer, for defendant.

G. C. Bronson (attorney-general), for the plaintiff.

By the Court, SUTHERLAND, J. The only question in this case is, whether the security required to be given by a *non-resident* plaintiff, upon applying for a warrant, is confined to such sum as may be adjudged against him by the justice, or whether it also extends to the final determination of the cause, where it is carried by appeal to the court of common pleas.

The provision is as follows: "If a person applying for a warrant be a non-resident and tenders to any justice *security for the payment of any sum which may be adjudged against him*, he shall be entitled to have a warrant in his favor against any person in the county in which such justice may reside." *Laws of 1824*, p. 281, § 5. There is nothing in this act which restricts the security to the costs before the justice. It extends in terms to any sum which may be adjudged against the non-resident plaintiff in said cause. It is the same cause, although carried by appeal to the court of common pleas, no new pleadings are put in, and it is considered but a continuation of the original suit. Thus in *The People, ex rel. Tomb v. The Judges of the Common Pleas of Washington County*, 1 *Cowen*, 576, it was held that in cases of appeal, the court of common pleas had no right to exact from the plaintiff security for costs, on the ground of his being a non-resident; that the statute regulating appeals had prescribed the security to be given, and none other could be exacted. This decision proceeds on the ground that the appeal is but a continuation of the suit before the justice and not the commencement of a new suit. 8 *Cowen*, 110. So where an action of trespass *quare clausum fregit* is commenced before a justice of the peace, and the defendant puts in a plea of title, and the plaintiff then commences his action in the court of common pleas for the same trespass, which the defendant removes into the Supreme Court by writ of *habeas cor-*

pus, and the plaintiff here recovers, he is entitled to *double costs*, it being considered after the removal to this court, as the same action originally commenced before the justice. 17 *Johns. R.*, 37; 1 *Cowen*, 425. The language of the act in this case is: "If such plaintiff shall recover *any damages in such action*, the defendant shall be liable to pay to such plaintiff *double costs*. 1 *R. L.*, 390, § 7. His title to costs, therefore, depends upon its being the same action.

I am therefore of opinion that the plaintiff is entitled to judgment upon the demurrer, with leave to the defendant to plead, on payment of costs.

SUPREME COURT.

Ex parte HAYNES, proceeded against as a *non-resident* debtor.

(18 *Wend.*, 611. *Decided* 1836.)

In a proceeding under the statute against a *non-resident debtor*, an affidavit of witnesses that they *are informed and believe* that a debtor is a non-resident, is not sufficient to authorize the issuing of an attachment; and where an attachment was issued upon such an affidavit, it was set aside, although the party proceeded against did not even allege that he was a resident of the State.

So, it seems, that an affidavit of *information and belief* of threatened waste is not sufficient to authorize even a temporary injunction.

PROCEEDINGS under the statute against *absconding, concealed and non-resident debtors*. An attachment was issued under this statute, 2 *R. S.*, 3, § 1, sub. 2, against the property of C. Y. Haynes, as a non-resident debtor. The application of the creditor was accompanied by an affidavit of two disinterested persons, who stated in the same that they *were informed and believed* that Haynes resided out of this State.

I. Williams, moved to set aside the attachment.

M. T. Reynolds, contra.

By the Court, COWEN, J. There is no branch of the law of evidence in which the cases are so far from consistency as they

appear to be in respect to the amount of proof, or even what shall be considered proof, for the purposes of these *ex parte* applications for process. A temporary injunction used to be very commonly issued on the party's own oath of mere information and belief that waste was committed or threatened. It was formerly thought that to obtain a *ne exeat*, it was enough for the plaintiff to swear to his belief that the defendant was going abroad. *Beames' Ne Exeat*, 24; *Russel v. Ashby*, 2 *Vesey*, 96; And see *Chapeau v. Cartearux*, in a note to *Amsinck v. Barclay*, 8 *Vesey*, 597. "But," says Mr. Beames, "the extreme vagueness of that rule has been, and that very properly, qualified by later decisions, and it is now held that the affidavit to obtain this writ must be positive as to the defendant's intention to go abroad, or to his threats or declarations to that effect, or to facts evincing it." *Oldham v. Oldham*, 7 *Vesey*, 410; *Etches v. Lane*, 7 *id.*, 417; *Amsinck v. Barclay*, 8 *id.*, 597; *Hannay v. McEntyre*, 11 *id.*, 54; *Jones v. Alphenesin*, 16 *id.*, 470; And see *Taylor v. Leitch*, 1 *Dick.*, 380, and *Shearman v. Shearman*, 3 *Bro.*, C. C., 370. And Lord Eldon has said he would never grant an injunction against waste, on an affidavit of belief that the defendant was going to cut timber (*Etches v. Lane*, 7 *Vesey*, 417, and *Hannay v. McEntyre*, 11 *id.*, 54), nor that the plaintiff was credibly informed the defendant intended to commit waste. *Hannay v. McEntyre*, 11 *Ves.*, 54. Yet, an affidavit made before a common magistrate that the deponent "has reason to suspect that several trees or parts of trees have been stolen from the King's forest of Hainault, and that they are carried to the premises of John Smith, carpenter, of Chigwell row, and there concealed, was, after much debate and great reflection by the King's bench, unanimously holden to be a good affidavit for the purpose of a *search warrant* as for stolen goods; that is to say, it was held sufficient to give the magistrate jurisdiction." This was as late as 1822, in *Elsee v. Smith*, 1 *Dowl. & Ryl.*, 97, on error from the common pleas. In *Ex parte Fitch*, 2 *Wendell*, 298, this court held that an affidavit of belief by two witnesses that the debtor resided out of the State was sufficient to warrant an attachment under the non-resident debtor act as it then stood; and according to the cases which I have cited, it will be seen that this was going no farther than the court of chancery formerly went in regard to like applica-

tions, nor so far, I think, as the King's bench and common pleas, both went in *Elsee v. Smith*. My great difficulty always was in relation to this general judicial kind of affidavit, to see that it amounted to any proof at all. This court formerly said that when a statute requires proof, for instance to obtain a warrant from a justice, it meant legal *evidence*. Accordingly a statute requiring a plaintiff to "prove to the satisfaction of a justice that the defendant was about to depart," &c., could not be satisfied with the plaintiff's own oath, because that was not competent evidence. To warrant that, the statute must be express. *Brown v. Hinckman*, 9 *Johns. R.*, 75. Forming my own notions [of legal evidence mainly at *nisi prius*, it was always difficult for me to perceive upon what ground a piece of evidence, which would never be thought of there as competent, could be received in another court professing to proceed by the same rules, and acted upon as sufficient to sustain any proceeding. Who ever heard of a witness being allowed, before a jury, to express his naked belief, or information, or that he had reason to suspect? On objection, such proof would never be received as even competent, much less as sufficient to be relied on for any purpose. The same rule in respect to *ex parte* applications for a *ne exeat* and injunction is strongly enforced and illustrated by Lord Eldon in the cases which I have cited from *Vesey*. I collect from those cases that he would consider belief, or information and belief, altogether incompetent. That there are exceptions to the rule, however, seems equally well established; and in addition to the cases already cited we have *Grumon v. Raymond*, 1 *Conn. R.*, 40, decided by a very learned court. It was there held, or rather the doctrine was laid down *obiter* by Reeve, Ch. J., that swearing to a strong suspicion of the concealment of goods in a certain place, accompanied with positive proof of their having been feloniously stolen, would authorize a warrant to search in the place thus suspected.

The former statute giving an attachment against the goods of non-residents "required proof to the satisfaction of the judge." On such a statute, with the high authorities to which I have referred, before me, I think I should not hesitate in receiving the oath of mere belief; but that statute no longer remains to us. Dissatisfied, it seems, with its construction in the case *Ex parte Fitch*, the legislature have demanded that "the facts and circumstances

to establish the grounds," of the application should be proved by two witnesses. 2 R. S., 3, § 35. The same learned judge (the late Chief Justice Savage) who delivered the opinion of this court in the matter of Fitch, has recently taken a leading part in construing another statute, which requires facts and circumstances to warrant an attachment by a justice of the peace. *Statutes, sessions of 1831*, p. 404, § 34, 35. The affidavit was of *belief* merely that the debtor was about to remove fraudulently, &c. The court held the affidavit insufficient. The chief justice said, "the plaintiff's own belief is neither a fact nor a circumstance upon which the justice can exercise his judgment. It is not sufficient that the plaintiff is satisfied; the justice must be satisfied from proof of facts and circumstances, not the belief of any one." The learned judge then goes into a course of illustration to show what would satisfy the statute. I will only say of these, that they must strike any mind which has been accustomed to judge upon the rules of evidence with great force, and they accord, so far as they go, with Lord Eldon's remarks in cases of *ne exeat*. *Smith v. Luce*, 14 *Wendell*, 237. In a similar case, *mere belief* was held insufficient to confer jurisdiction. *Loder v. Phelps*, 13 *Wendell*, 46.

But the deponents are *informed*, and information is said to be a fact or circumstance. That is indeed so, but we are now upon ground where we must have regard to the relevancy of evidence as well as its competency in other respects. *Information*, which is another word for *hearsay*, is generally not evidence. There are exceptions to the rule, as, if it come from the party against whom it is adduced, or be elicited on diligent enquiry as to residence, &c.; but the party offering it must show that it comes within the exception. For aught we know, the witnesses may have been informed by the party who made the application. In *Hannay v. McEntyre*, Lord Eldon said, "The affidavit representing belief upon information, the court should know the particulars of that information; the person giving the information can state the ground of it." In short, any kind of information that we can imagine would satisfy such an affidavit as was presented in this case. To receive it, would be a complete evasion of the statute. An affidavit for a justice's attachment, much more full as to information than this, was holden insufficient on *certiorari* in *Tallman v. Bigelow*, 10 *Wendell*, 420.

On the whole, I feel no difficulty in saying that the affidavits in this case are not sufficient to sustain the attachment. No excuse is given for their being so very vague and unsatisfactory. Ordinarily, the mere question of residence is one to which many persons can speak, from circumstances at least. It is not like the case of absconding, or fraudulent concealment of goods; nor can I give any effect to the argument, in such a case, that non-residence is not denied; the *onus*, of course, lies with the applicant; and though in a case of fraud, where difficulty in obtaining full proof frequently exists, there might be a reason for excusing from costs, I see nothing of that sort here. The motion must be granted, with costs.

SUPREME COURT.

GIBBS v. LOOMIS.

(10 *John.*, 463. *Decided* 1813.)

The *privilege* of *attorneys* of *inferior* courts from arrest by process from the *Supreme Court*, does not extend beyond the time of their necessary attendance on those courts.

THIS was an action of trespass, assault and battery, &c. The defendant pleaded that he was, before the filing of the plaintiff's bill, and at this time is, an attorney of the Court of Common Pleas of Washington county, &c., attending to divers pleas and affairs, &c., of persons, prosecuting and defending them as their attorney, &c., and that he and all other attorneys of that court, while so prosecuting and defending, according to the custom of the same court, &c., should not, nor ought to be, drawn or compelled, nor at any time past, have been drawn or compelled, against their will, to answer before any justice or other judges whatsoever, except before the said Court of Common Pleas, nor any plea, plaint or demand, which does not touch the right of the people, &c., pleas of freehold and felonies only excepted; and this he is ready to verify. Wherefore he prays judgment if he ought to answer, &c.

To this plea there was a demurrer and joinder in demurrer, and the same was submitted to the court without argument.

Per CURIAM. The privilege of the officers of *inferior* courts from arrest by process from this court, has never been extended beyond the time of their necessary attendance on those courts. They have no exclusive perpetual privilege as against the jurisdiction of this court.

Judgment of *respondeas ouster*.

SUPREME COURT.

TIFFANY v. DRIGGS & LYNCH.

(13 *John.*, 252. *Decided* 1816.)

Where an attorney is sued in a justice's court, jointly with another defendant, he cannot plead in abatement that the court of which he is an attorney is then sitting.

IN error, on *certiorari* to a justice's court.

The plaintiff in error brought an action of *assumpsit* against the defendants, in the court below, for work and labor. The defendants pleaded that Lynch, one of the defendants, was an attorney of the Supreme Court, which was then sitting. The plaintiff objected that the Supreme Court was not sitting when the summons was issued, but the justice decided that this was immaterial; and the plaintiff having no further answer, the justice gave judgment for the defendants.

Per CURIAM. The first section of the act for the recovery of debts to the value of 25 dollars (1 N. R. L., 387.) (6) gives cognizance to a justice of the peace of all actions not exceeding 25 dollars, as well against attorneys and other officers of any court of justice in this State, (except during the sitting of such court,) as others.

Before the passing of this statute, it must be conceded that an attorney in no court of justice could be allowed to plead his privilege, when prosecuted, jointly with others; and the above section does not enlarge this privilege so as to extend it to such a case. It evidently intends no more than that an attorney shall not avail himself of the privilege he was entitled to before the passing

of the act, except during the sitting of the court; and the law remains unaltered when he is sued jointly with another.

Lynch having been prosecuted jointly with Driggs, his plea of privilege ought not to have been allowed by the justice. It was, therefore, unimportant whether the court, of which he was an attorney, was in session at the time the summons issued or when the trial took place; it is manifest, that the proceedings of the justice were erroneous in extending to him a privilege to which he was not entitled. The judgment must, therefore, be reversed.

Judgment reversed.

SUPREME COURT.

MILLER v. BRINKERHOFF.

(4 *Denio*, 118. *Decided* 1847.)

Where certain facts are required to be proved to warrant the issuing of process, in a court of special and limited jurisdiction, if there be a total defect of proof as to any essential point, the process will be void.

But where the proof, though slight and inconclusive, legally tends to establish all the essential facts, the process will be valid when questioned collaterally, and can only be avoided by a direct proceeding to set it aside. *Per* Bronson, C. J. Where application was made to a justice of the peace for an attachment, on the ground that the debtors had assigned and disposed of and were about to remove their property from the county with intent to defraud their creditors, and the affidavits stated only that the defendants had made two assignments of property to the same person, and that they said they had then no property and could pay no debts; *held* that there was a total defect of evidence of an intent to defraud creditors and that the attachment was void.

ERROR to Tioga, C. P. Brinkerhoff sued Miller before a justice, in trespass, for taking his cow. On the trial, the defendant proposed to justify the taking of the cow under an attachment in his favor against the plaintiff and one Hoyt, issued by a justice of the peace. The affidavit on which the attachment issued was made on the 13th day of December, 1838, and stated, in proper form, that the plaintiff and Hoyt were indebted to the defendant upon contract, and that the application was made on the ground that the plaintiff and Hoyt had assigned and disposed of, and were

about to remove their property from the county of Tioga, with intent to defraud their creditors. It then proceeded thus: "And this deponent further saith, that the said James I. Brinkerhoff and Israel S. Hoyt, made an assignment of some of their property last spring to L. P. Hand of Albany, and that said Brinkerhoff and Hoyt told this deponent that they had made another assignment to the same man last week; and also (that) the said Hand, or his agent, was going to remove some of the property out of the county of Tioga on the 11th instant; and also that they said they had no property and could pay no debts." The justice, in the suit on trial, decided that the affidavit was not sufficient to confer jurisdiction on the justice who issued the attachment. Judgment was rendered for the plaintiff for the value of the cow, which the C. P. affirmed on *certiorari*. The defendant brings error.

John J. Taylor, for the plaintiff in error.

J. M. Parker, for the defendant in error.

By the Court, BRONSON, Ch. J. When certain facts are to be proved to a court of special and limited jurisdiction, as a ground for issuing process, if there be a total defect of evidence as to any essential fact, the process will be declared void, in whatever form the question may arise. This is sufficiently established by the cases cited at the bar, as well as by many others to be found in the books. But when the proof has a legal tendency to make out a proper case in all its parts for issuing the process, then, although the proof may be slight and inconclusive, the process will be valid until it is set aside by a direct proceeding for that purpose. In one case, the court acts without authority, in the other, it only errs in judgment upon a question properly before it for adjudication. (*Matter of Faulkner*, 4 Hill, 598; *Harman v. Brotherson*, 1 Denio, 537; *Vosburgh v. Welch*, 11 John., 175; *Tallman v. Bigelow*, 10 Wend., 420.) In one case there is a defect of jurisdiction; in the other there is only an error of judgment. Want of jurisdiction makes the act void; but a mistake concerning the just weight and importance of evidence, only makes the act erroneous, and it will stand good until reversed. I think this a sound distinction, though it rests in some degree upon my own authority.

The defendant claims the benefit of the distinction, and I think him entitled to it. But it will not help out his case; for although the affidavit was sufficient in some particulars, it was totally defective in others. It is entirely silent as to the most material fact, the intent to defraud creditors. That the applicant for the attachment had a debt arising upon a contract was sufficiently proved; but the only "facts and circumstances" set forth as a ground for issuing the process are, that the debtors had made two assignments of their property; and that the assignee was about to remove a part of the property out of the county. To which it was added, that the debtor said they had no property, and could pay no debts. There is no fact or circumstance to show—nor is there even the intimation of a belief—that the debtors had assigned the property, or were about to remove it from the county with intent to defraud their creditors. (*Stat.* 1831, *p.* 404, §§ 34, 35.) The affidavit was bad within all the cases; and the proceedings founded upon it were void, as well as erroneous.

Judgment affirmed.

SUPREME COURT.

EX PARTE SHUMWAY.

(4 *Denio*, 258. *Decided* 1847.)

* * * * *

It is not sufficient in the affidavit to name the deponent as the attorney or agent of the creditor. It must be expressly sworn to.

* * * * *

* * * After the title of the suit, this affidavit commenced as follows: Columbia county, ss. *Martin Van Dusen*, the attorney of the above named plaintiff, being duly sworn, saith."

H. Hogeboom, on behalf of Isaac Shumway.

K. Miller & P. W Bishop, contra.

By the Court, JEWETT, J. * * * * *

* * * * * * * *

* * * Van Dusen being unauthorized under his retainer in the suit in which the judgment was recovered to make the affidavit, it was essential that his character as the attorney of the creditor in the special proceeding should be directly sworn to in the affidavit. It was so held where the affidavit was made by one claiming to be the *agent* of the creditor. (*Ex parte The Bank of Monroe, 7 Hill, 177.*) In that case, as in the present, he was named as the agent, but this was held to be merely *descriptio personæ*. The principle there decided must govern this case; and the motion for a mandamus must consequently be denied.

Motion denied.

SUPREME COURT.

DEWEY v. GREENE.

(4 *Denio*, 93. *Decided* 1847.)

An affidavit on an application for an attachment in a justice's court, in which the facts are stated upon the belief only of the deponent, is fatally defective. And such defect, if objected to by the defendant before pleading, may be taken advantage of on *certiorari*, though the defendant pleaded to the action after the objection was overruled.

If the defendant had pleaded without taking the objection, the defect would have been waived. *Per* BEARDSLEY, J.

ERROR to the Jefferson common pleas. Greene applied for an attachment against Dewey, before a justice of the peace, and made affidavit that the defendant was indebted to him upon contract in the sum of six dollars, as near as he could calculate, over and above all discounts; and that the attachment was applied for on the ground that the defendant had fled from the county of Jefferson into the county of Lewis, as the deponent believed, to defraud his creditors; that the facts and circumstances upon which such belief was predicated were, that said Dewey had that day fled from said county of Jefferson, where he last resided, and in a secret and clandestine manner, as the deponent believed. An attachment was

accordingly issued. On the return day the parties appeared and the plaintiff declared. The defendant objected that the affidavit was defective in that the facts were stated only on belief. The justice overruled the objection and the defendant pleaded the general issue. After a trial the justice gave judgment for the plaintiff, which the common pleas affirmed on *certiorari*; from which judgment of affirmance the defendant brought error to this court.

W. L. Sherman, for the plaintiff in error.

W. C. Thompson, for the defendant in error.

By the Court, BEARDSLEY, J. That the defendant had fled from Jefferson to Lewis, was stated in the affidavit of the plaintiff as a mere matter of belief; he did not profess to have any knowledge on the subject, nor even to have been so informed. As I read the affidavit, every thing therein stated is on belief, and not as a matter of fact within the knowledge or information of the plaintiff. This was not enough to authorize an attachment. (*Laws of 1831*, p. 404, § 35.) On this ground the defendant objected to the attachment as irregular, but the objection was overruled and he then pleaded the general issue.

The objection was made in due time and was well taken; the attachment should have been set aside as irregular. Nor was the objection waived by subsequently pleading the general issue. (*Avery v. Slack*, 17 *Wend.*, 85; *Shannon v. Comstock*, 21 *id.*, 457; *Wheeler v. Lampman*, 14 *John.*, 481.) Had this plea been interposed by the defendant, without having previously objected to the process as irregular, it would have been deemed a waiver. (*Wheeler v. Lampman* [*supra*]; *Swartwout v. Roddis*, 5 *Hill*, 118.) But when the question of regularity is made at the proper time, and improperly overruled, the party is never concluded by pleading to the action. He does what he can, and at the earliest opportunity, to arrest the irregular proceeding; but being defeated in this by the erroneous decision of the justice, the party cannot be deemed to have waived anything by subsequently pleading to the declaration, and making the best defence in his power. This is the proper distinction to be made in all cases of this description.

There are cases which hold that this objection cannot be taken, where the cause has been carried to the common pleas by appeal. (*Malone v. Clark*, 2 *Hill*, 657; *Swartwout v. Roddis* [*supra*]; *Wood v. Randall*, 5 *Hill*, 264.) But this is because the remedy by appeal does not reach such an error; and not because the waiver was cured, or the right to take advantage of it waived, by pleading to the action.

Judgment reversed.

SUPREME COURT.

THE PEOPLE *ex rel.* TOMB *against* THE JUDGES OF THE COURT
OF COMMON PLEAS OF THE COUNTY OF WASHINGTON.

(1 *Cowen*, 576. *Decided* 1823.)

On appeal from a justice's court, a court of common pleas cannot restrain the appellant from proceeding in the cause, until security for costs is given, on the ground that he is a non-resident.

Nor can they order that until security for costs is given, the appellee shall be entitled to an affirmance of his judgment, *ex parte*. The security made necessary by the statute (Sess., 41, ch. 94, § 17), is all that can be required.

AN alternative *mandamus* was granted in *January* term last, requiring the defendants to vacate a rule granted by them, prohibiting *Tomb* from appearing in a cause brought into the court of common pleas of *Washington* county by appeal from a justices' court, by *Tomb*, as appellant, against one *Munson*, as appellee. The judges returned that the cause in the justices's court was by *Munson*, plaintiff, against *Tomb*, defendant; that the justice rendered judgment against *Tomb*, for \$25.06, besides costs—whereupon *Tomb* appealed; that to the return of the justice was annexed a bond of the appellant, and one *William Tomb*, as his security, duly approved of by the justice, as the act, &c., provides; that in *August term*, 1818, the court of common pleas made a rule, "that on all appeals from a justices's court, if the appellant be a non-resident of the county of *Washington*, on filing an affidavit thereof, the appellee might enter a rule in the common rule book, that the proceedings on the appellant's part be stayed until security for

costs should be filed in the office of the clerk of that court, which rule should not be operative till notice thereof should be duly served; which security should be a bond to be executed by a sufficient person, being a house-keeper of said county, in the sum of fifty dollars, conditioned for the payment of such costs as might be adjudged to the appellee on the determination of the appeal between the parties, and accompanied with an affidavit, specifying that the person executing the bond is a house-keeper (in some town particularizing it) in the said county; and that he is worth the sum of \$100, over and above all debts owing by him;" that this rule still remains in force; that the proceedings on the part of *Tomb* were stayed under this rule; that a motion had been made to vacate the rule staying proceedings, but denied; and further, that, at *December term*, 1822, upon motion, granted on affidavit, that the appellant and his bail had absconded and left the county, the court made a rule against the consent of *Tomb's* counsel, that when the said cause should be called on the calendar, unless a bond, in pursuance of the rule before entered, should be filed, previous to its being so called, the appellee should be entitled to have said judgment affirmed, *ex parte*, or by default; that on the cause being called, the court accordingly refused to let the counsel of *Tomb* appear, he not having complied with the rule; and the judgment was affirmed by default.

J. Willard, for the plaintiff.

S. Stevens, contra.

CURIA. The proceedings of the common pleas were altogether irregular. The statute prescribes what security shall be given to ensure a hearing; and that when the court of common pleas become possessed of the cause, they shall, upon application of either party, and by rules adapted to the case, cause the parties to proceed, with all reasonable diligence, to the hearing of the cause. They cannot require additional security beyond that prescribed in the statute. Suppose a defendant gives bail, who justify: These bail become insolvent before trial: Was it ever heard or thought of, that the court may require him to give additional bail, upon penalty of being refused a hearing for his non-compliance? To allow of this

proceeding would be perverting the plain intent and purpose of the statute, to which the common pleas must be confined.

Rule for a peremptory *mandamus*.

SUPREME COURT.

FENNO v. DICKINSON.

(4 *Denio*, 84. *Decided* 1847.)

A *certiorari* in a justice's court is a new suit; and therefore the covenant of the surety for a non-resident plaintiff on suing out a summons—to pay any sum that may be adjudged against the plaintiff in that suit—does not extend to the costs of a reversal on *certiorari*, of the judgment recovered by the plaintiff before the justice in the suit commenced by the summons.

ERROR to the Chenango common pleas, to review a judgment of that court affirming a justice's judgment on *certiorari*. Dickinson sued Fenno before the justice on a covenant executed by the latter to the plaintiff. The instrument recited that C. Mann, a non-resident of the county, had applied to S. D., a justice of the peace, for a summons against Dickinson, and stated that the defendant thereby became surety that Mann should pay any sum which might be "adjudged against him, Mann, in the said suit." It appeared that Mann recovered in the suit commenced by him before the justice, but Dickinson brought a *certiorari* to the common pleas, where the judgment was reversed and twenty dollars costs were awarded against Mann. In this suit on the covenant the justice gave judgment for the plaintiff for the twenty dollars with costs, which last mentioned judgment was affirmed by the common pleas.

F. U. Fenno, plaintiff in error, in person.

A. C. Moses, for the defendant in error.

By the Court, BEARDSLEY, J. Where an appeal is taken to a court of common pleas from a judgment rendered by a justice of the peace, the proceedings in the appellate court are but a con-

tinuation of those previously had before the justice. The remedy by appeal is, in effect, a new trial of the cause in the court of common pleas, which the unsuccessful party is entitled to on procuring his appeal to be allowed, and on giving such security as the law requires. The entire proceedings in such case, are all in one suit although it was pending at different periods in district courts. This was so held in *Traver v. Nichols*, (7 Wend., 434,) where it was adjudged that the security given by a plaintiff, on the commencement of a suit in the justice's court for the payment of any sum which might be adjudged against him, extended to such costs as were adjudged against him by the court of common pleas, on an appeal from the judgment recovered by the plaintiff before the justice. But a *certiorari*, sued out to reverse a judgment of a justice of the peace, like a writ of error, is the commencement of a new trial and not the continuation of an old one. In this case the covenant of the defendant bound him to pay the plaintiff any sum which might be adjudged in favor of the plaintiff, and against Mann, *in the suit* wherein Mann was plaintiff and the present plaintiff was defendant. But nothing was adjudged against Mann in that suit; on the contrary, judgment was rendered in his favor. That judgment was subsequently reversed on *certiorari*, and costs adjudged against Mann; but this judgment for costs was rendered in a new suit, and not in the suit commenced before the justice. The defendant was therefore not holden for these costs, and the judgments below were erroneous.

Judgments reversed.

SUPREME COURT.

CUNNINGHAM v. GOELET.

(4 *Denio*, 71. *Decided* 1847.)

In an affidavit made by the agent of the landlord to procure a summons in a summary proceeding to recover the possession of land, it is not sufficient that the deponent be *described* as agent, but the fact must be directly sworn to.

* * * * *

SUMMARY proceedings to recover possession of demised premises. On the 2d of May, 1846, an affidavit was made before one of the aldermen of the city of New York, as follows :

“ *City and County of New York, ss.:*

“ Patrick Henry, agent for Peter Goelet, being duly sworn, doth depose and say, that on or about the 1st day of April, 1843, said Goelet rented unto Francis Cunningham the house No. 20 Morris street in the city of New York, for the term of three years from the first day of May then next, which said term has expired, and that he or his assigns hold over and continue in possession of the said premises, without the permission of the said Goelet.”

* * * * *

E. CASSERLY, for Cunningham.

T. B. GILFORD, for Goelet.

By the Court, BRONSON, Ch. J. Although Henry in his affidavit describes himself as agent for Goelet, he does not swear that he was such agent. (*Ex parte Bank of Monroe*, 7 *Hill*, 177; *Ex parte Aldrich*, 1 *Denio*, 662.) The summons was also defective.

* * * * *

Proceedings reversed.

SUPREME COURT.

EARL v. SPOONER & DIXON.

(3 *Denio*, 246. *Decided* 1846.)

The obligors in a bond executed upon the issuing of an attachment in a justice's court, where the plaintiff has failed to recover judgment, are, *prima facie*, liable for the value of the property attached. *Per* Beardsley, J.

But where property was seized and removed by virtue of an attachment, and the plaintiff having been nonsuited on the trial, immediately sued out another attachment, upon which the officer who served the first, seized the same property, in his own possession, on the second attachment, and afterwards sold it on the execution in that suit; in an action on the bond given on the issuing of the first attachment, *held*, that the defendants were entitled to show the appropriation of the property on the process in the second attachment suit in reduction of damages.

ERROR to the Warren common pleas. Earl sued Spooner & Dixon before a justice of the peace and recovered \$2 besides costs, which judgment the common pleas upon *certiorari* prosecuted by the *plaintiff*, affirmed; whereupon the plaintiff brought error to this court. The action was covenant, on a bond executed by the defendants in the penalty of \$100, given to produce the issuing of an attachment before a justice in favor of Spooner against the plaintiff, which was conditioned pursuant to the statute (2 *R. S.*, 230, § 29), to be void if (among other things) Spooner should pay the defendant (the plaintiff in the suit) all damages and costs which he might sustain by reason of the issuing of the attachment in case Spooner should fail to recover judgment in the attachment suit. An attachment was accordingly issued upon which certain chattels of the plaintiff, worth about thirty dollars, were seized by a constable; who took them into his possession and locked them up, and returned the attachment. On the return day the parties appeared before the justice, when the plaintiff in that suit (Spooner) was nonsuited, upon what ground is not stated in the return. The plaintiff, in the suit on the bond, sought to recover the value of the property attached, and proved that it had never been returned. On the part of the defendants it was permitted to be shown, though objected to by the plaintiff, that immediately after the judgment of nonsuit, the same justice issued another attachment in favor of Spooner against the plaintiff, by virtue of

which the same constable attached the same property, and, judgment having been rendered for the plaintiff in this second attachment suit, sold it on the execution.

A. T. Wilson, for the plaintiff in error.

E. H. Rosekrans, for the defendant in error.

By the Court, BEARDSLEY, J. I think there was no error in allowing the defendants to give evidence of the second attachment and proceedings thereon, including a sale of the property to satisfy the judgment thus recovered against the plaintiff in this suit. The evidence was pertinent and material to the question of damages, and it seems to have been received for that purpose alone.

The defendants were bound by their bond to pay the plaintiff all damages and costs which he might sustain by reason of the issuing of the attachment referred to in said bond, if the plaintiff in said attachment failed to recover judgment thereon. No such judgment was recovered, but on the contrary a judgment of nonsuit was rendered against the plaintiff in the attachment. The condition of the bond was thus broken, and *prima facie* the defendants were responsible for the full value of the property which had been seized on the attachment. They had bound themselves to pay all damages which the defendant in the attachment might sustain "by reason of the issuing of such attachment," and *prima facie* he had sustained damages to the extent of the value of the property taken from him on the attachment. A return or an offer to return the property to the owner might have changed the rule of damages, and so might its seizure and sale on other and legal process against the owner. It was still his property notwithstanding the seizure on the first attachment, and as such was liable to be taken on the second attachment. The action was covenant, and the defendants were responsible to the extent of the obligation assumed in executing the bond, but not as trespassers, which distinguishes the present case from that of *Otis v. Jones* (21 Wend., 394), referred to by the plaintiff in error.

The plaintiff recovered some damages, and we suppose all which he had actually sustained by the issuing of the first attachment, and the levy thereof on his property. The second seizure of this

property, immediately after it had been liberated from the first levy, by the judgment of nonsuit, was strictly legal, and as the property has been applied according to law to satisfy a debt due from the owner, that was very properly admitted in evidence to reduce the amount of damages sought to be recovered. The judgment rendered by the justice was free from error, and was properly affirmed by the common pleas.

Judgment affirmed.

SUPREME COURT.

MILLIUS v. SHAFER.

(3 *Denio*, 60. *Decided* 1846.)

The affidavit required by the statute (*Laws of 1831, p. 434, § 35*), to authorize a justice of the peace to issue an attachment, need not be signed by the deponent. If the witness be sworn and the justice take down and certify the testimony, it is a sufficient affidavit.

Where the bond executed upon an application for an attachment professed to be the bond of the creditor who applied, and of two sureties, and was executed thus: W. S., *agent* for J. S. (the principal) the sureties executing in proper form; *held* sufficient, although the plaintiff was not bound.

ERROR from the Columbia Common Pleas, to review a judgment of that court affirming a judgment rendered by a justice of the peace. The suit before the justice was by Jacob Shafer against Millius, and was commenced by attachment under the act to abolish imprisonment for debt, &c. (*Stat. 1831, p. 404, § 34.*) Walter Shafer, as the agent of the plaintiff, applied for the attachment and made a formal affidavit setting forth that the defendant was indebted to the plaintiff, and also stating certain facts tending to show that the defendant had assigned, disposed of or secreted his property, with intent to defraud his creditors. The justice then examined W. Shafer and another witness on oath as to other facts and circumstances to support the application, writing down the testimony of each as it was given, and certifying at the foot of each deposition that it was taken before him; but these statements were

not signed by the witnesses. The bond delivered to the justice commenced, "Know all men by these presents, that we, Jacob Shafer, by Walter Shafer, his agent, and Russel G. Dorr, and Walter Shafer, are held," &c., and was executed thus: "Walter Shafer, agent for Jacob Shafer, L. S.; Walter Shafer, L. S.; Russel G. Dorr, L. S."

Upon these papers the justice issued the attachment, and on the return day the defendant appeared and moved to quash the proceedings on the ground that the attachment had issued irregularly, there being, as he alleged, no sufficient affidavit or bond. The motion was denied. No plea was put in, and the justice, upon the plaintiff's evidence, rendered judgment against the defendant, which being affirmed by the Common Pleas on *certiorari*, the defendant brought error here.

J. Gaul, Jr., for the plaintiff in error.

C. L. Monell, for the defendant in error.

By the Court, BEARDSLEY, J. I think there was no error in acting upon these sworn statements, although not signed by the deponents. The statute requires the proof to be made by affidavit (*Laws* 1831, p. 404, § 35); and these were affidavits, although not signed. (*Jackson v. Virgil*, 3 *John.*, 540.) The facts and circumstances stated in these papers fully warrant the conclusion that the defendant below had assigned, disposed of or secreted his property, with intent to defraud his creditors, or that he was about to do so, and were therefore sufficient to justify the issuing of an attachment. (*P.* 404, *supra*, § 34.) The bond, as I think, was sufficient. It was the bond of the agent, W. S., individually, and another person, given on behalf of the plaintiff, and as such satisfies the statute, although the plaintiff may not have been bound by it. The judgment should be affirmed.

Judgment affirmed.

SUPREME COURT.

J. & S. SHANNON v. COMSTOCK AND OTHERS.

(21 *Wend.*, 457. *Decided* 1839.)

* * * * *

Where it appears that a person has been arrested on a warrant issued from a justice's court, in a suit instituted for the recovery of damages for the non-performance of a contract, when such arrest was unauthorized by the act to abolish imprisonment for debt, the justice should dismiss the proceedings, notwithstanding they were founded on proof of the non-residence of such person. Where two defendants plead in abatement matter personal to one of them, the plea is bad.

Where two defendants have been arrested, and one of them is entitled to exemption he may be discharged.

ERROR from common pleas of Washington county. An action was commenced by warrant in a justice's court by Comstock and others against J. & S. Shannon, for the breach of a contract. The issuance of the warrant was founded upon proof by affidavit that the defendants were non-residents of the State. After the arrest and upon the appearance of the defendants, the plaintiffs declared on the contract, &c., &c., &c. The defendants then, before pleading, moved to quash the proceedings on the ground that they were residents of the city of New York and not subject to arrest by warrant. The plaintiffs then admitted that the defendants were then and for more than thirty days had been, residents of the town of Granville, Washington county. The justice declined to grant the motion. The defendants then interposed the plea in abatement that Joseph Shannon, one of the defendants, at the time of the commencement of the suit, was, and for more than thirty days preceding, had been, a resident of this State. The plaintiffs demurred. The justice ruled the plea bad. A general denial was then pleaded by the defendants and the trial then proceeded. The jury found a verdict for the plaintiffs, and the justice rendered judgment in their favor. The common pleas of Washington county affirmed the judgment, when the defendants sued out a writ of error.

Culver, for the plaintiffs in error.

Gibbs, for the defendants in error.

By the Court, COWEN, J. Upon the motion to quash the warrant, the plaintiffs before the justice admitted that the defendants were residents of Granville, in Washington county, and had been so for more than thirty days before the warrant was taken out. The justice had jurisdiction of the process, and the affidavit on which the warrant issued made it regular in the first instance. But certainly the affidavit was not conclusive. It was still open to be met by the defendants, on proof that it was made under a plain mistake. That was admitted, and the justice should, therefore, have dismissed the suit; or, to speak more technically, he should have set aside the proceedings for irregularity.

I admit the plea in abatement was bad. It went to the whole suit, for a cause personal to one of the defendants only. It was therefore bad as a plea, whatever it might have been as a motion. *De Forest v. Jewett*, 1 *Hall's R.*, 137. I am inclined to think that where two persons are arrested in a suit against both jointly upon a contract, and one is a resident of this State and has been for more than a month, he must be discharged. But let that pass.

Nor is it any answer that the defendants finally pleaded in bar. Such an answer must rest on the ground of voluntary waiver; here the propriety of the arrest was questioned at once, on admitted facts, and the defendants were compelled to plead over.

* * * * * * *

The judgments of the courts below must be reversed.

Ordered accordingly.

SUPREME COURT.

Ex parte L. ROBINSON *proceeded against as an absconding debtor.*

(21 *Wend.*, 672. *Decided* 1840.)

By the Court, NELSON, J. The statute prescribes, that whenever the debtor shall *secretly depart from the State with intent to defraud his creditors, &c.*, application for an attachment may be made, &c. 1 R. S., 765, § 1. The application shall be in writing, verified by the affidavit of the creditor, &c., and among other things, shall state "the grounds" upon which it is founded. § 4.

And the facts and circumstances to *establish the grounds*, &c., shall be verified by the affidavit of disinterested witnesses. The witnesses in this case state that they inquired for R. at his late residence, and were informed that he had left the State for Michigan, and was not in the county. They further say, *that he has left the State with intent to defraud his creditors*. The counsel for the applicant supposes that the fact itself of absconding with the fraudulent intent, is here affirmed by the two witnesses, and that it is better evidence than the *facts and circumstances*. The statute, however, requires them to be stated, and was intended to break up the practice of swearing within the words of the general ground upon which the process issued.

Affirming that a party has left the State *with intent to defraud his creditors*, may be predicated more upon matters of opinion, or belief, than upon fact. The affirmant may honestly believe, and thus affirm it in general terms; whereas, if called to state the facts and circumstances upon which he reached the conclusion, the officer (being thus enabled to exercise his judgment in the matter) might well differ from him. Certainly, as far as the witnesses here undertook to explain, they failed altogether in laying any foundation for their conclusion, unless we are to assume that a visit to Michigan is at least *prima facie*, if not conclusive evidence, of an intent to abscond in fraud of creditors. The case of *Smith v. Luce*, 14 Wend., 237, is an authority on this point. There, in an analogous case, the affidavit was in the general words of the act, but was holden defective in not stating the *facts and circumstances* upon which the general affirmation was predicated.

Proceedings reversed.

SUPREME COURT.

EDWARDS v. RUSSELL.

(21 *Wend.*, 63. *Decided* 1839.)

Where a justice of the peace is related to one of the parties to an action brought before him, by consanguinity or affinity, all further proceedings should be suspended upon such fact being brought to his notice. Nor can he, on that ground, render judgment of non-suit, if the plaintiff be his relative.

L. Badger, for plaintiff in error.

F. G. Wheeler, for defendant in error.

By the Court, COWEN, J. It is declared by statute that "no judge of any court *can sit* as such in any case to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties." 2 *R. S.* 264, § 2, *2d ed.* It is not denied that this applies to a justice. But it is said, first, that no proof of relationship was given, and the justice could not take judicial notice of it. Enough is collectible from the return, to warrant us in saying that it was admitted. I think, however, he may withdraw himself on his mere suggestion, and such is the uniform course with other judges. In the case of a justice, as long ago as August, 1821, this court acted on his admission that he was the son-in-law of the plaintiff, as an auxiliary ground for reversing his judgment. *Bellows v. Pearson*, 19 *Johns. R.*, 172. The statute is directory; and doubtless had reference to the practice. The process sometimes goes on in the court of a judge to whom the party is related, where there are other judges having power; but where there are none other, as in case of a justice, he cannot issue process. Such an act would be nugatory and void, for he cannot sit even to receive the return. The objection meets him at the threshold; and if he issue process inadvertently, he ought simply to withdraw himself from the cause. *He cannot sit*, says the statute. The meaning is, not merely that the interests of the parties are unsafe, but the general interest of the justice. Decency forbids that he should be seen acting either for or against his father, brother or cousin, &c.

It is said very plausibly that the party sued and who is not connected, ought not to be deprived of his costs; and therefore the judgment of non-suit should have been allowed to stand. That would be true, if his interest alone had been regarded by the statute. But I cannot bring myself to think that its reasons were so narrow. The same thing might be said of a suit commenced before a tavern keeper, having no jurisdiction until it is seen that he is forbidden to act upon grounds of public policy. Any judgment rendered by him is therefore void. *Low v. Rice*, 8 Johns. Rep., 409. *Clayton v. Per Dun*, 13 id., 218. So here, I think the judgment was properly reversed by the C. P., whose judgment is, therefore, affirmed.

SUPREME COURT.

BALL v. GARDNER.

(21 Wend., 270. Decided 1839.)

Where a party, upon an application for an attachment, from a justices court, gives a bond that he will pay *all damages and costs if he fail to recover*, his liability extends to the final determination of the cause. A suit may be brought on such a bond, where a recovery is had before the justice which is afterward reversed.

C. Tracy, for the defendants.

C. B. Gay, for the plaintiff.

By the Court, NELSON, Ch. J. The main question raised upon the pleading is, whether the condition of the bond taken on the suing out of the attachment, extends to and is controlled by the final result in the common pleas; in other words, whether the condition is kept by the recovery of judgment before the justice.

The statute provides for the giving of the bond, and prescribes that it shall be "conditioned to pay such defendant all damages and costs which he may sustain by reason of the issuing such attachment, if such plaintiff fail to recover judgment thereon."

2 R. S. 230, § 29. See also *Statutes, Sess. of 1831, p. 404, § 135*. The bond is in conformity to the statute. The question has already been decided in respect to the bond given by a *non-resident* plaintiff for the purpose of obtaining a warrant under this act 7 *Wendell*, 434. The statute there is, that he must give "*security for the payment of any sum which may be adjudged against him in the suit.*" The court saw nothing in the language restricting the security to the costs before the justice, but held that the suit on the *appeal* was the same as the one before the court below, and the result fairly within the scope of the condition. These reasons apply with greater force in the case before us. The plaintiff in the attachment binds himself to pay all *damages and costs* that the defendant may sustain *by reason of the issuing of it*, if he fail to recover judgment thereon. Now it is clear that he has failed. The reversal in the common pleas on the *certiorari* has at least vacated the judgment before the justice; and if it proceeded upon the merits has finally disposed of the subject matter of litigation. *Close v. Stuart*, 4 *Wendell*, 95; and 9 *id.* 674, 678. Even if it turned upon technical ground, the suit before the justice is at an end, and a new one must be instituted, unless a new venire is directed to be issued, which, I believe, has never been done in a justice's court. I need not pursue this question, as I am certain it has already been considered and decided in this court, though the case has not been reported.

It is said the replications to the first and second pleas on the record before us, depart from the declaration. I think not. The contents charge that Gardner failed to recover judgment before the justice; the pleas set up a judgment recovered there; the replications show a reversal in the common pleas, which fortifies and maintains the allegation in the courts. This must be so, if we are right in the conclusion that the bond is not restricted to the judgment as recovered by the party before the justice, but extends to the final result of the cause. The objection to the *special damages* alleged in the second count, if well taken, is unavailing here, for the matter, if inapplicable to a case of this kind, can be reached only by a *special demurrer*, and cannot be taken advantage of by a demurrer to the replication.

Judgment for plaintiff.

SUPREME COURT.

HENRY C. STEVENS, respondent, v. SETH F. BENTON, appellant.

(39 *How.*, 13. *Decided* 1869.)

By taking his appeal from the judgment of a justice of the peace in form as for a new trial, the appellant does not waive the right to insist that an attachment, through which the justice took cognizance of the case, was void. Per Foster, J. Or to raise in the appellate court as fully as he might if he had appealed on questions of law only, all questions properly raised in the court below, excepting those to proceedings which took place on the trial of the action. *Id.*

The affidavit presented to a justice of the peace under the act to abolish imprisonment for debt (1831, § 33), as the basis for a short attachment, need not state facts showing any fraudulent or improper act, as required in the affidavit on application for a long attachment. *Id.*

But quere, whether an objection that the affidavit does not state the facts which show that the claim is on contract, and which render a warrant impossible under section 30, is not available to the defendant. *Id.*

When it appears on the return of an attachment issued under section 33, that property has been attached, but that a copy of the inventory and attachment have not been personally served, the justice obtains no jurisdiction of the person until the return of a summons. (§ 38.) *Id.*

If therefore, the defendant appears on the return of the summons, joins issue, &c., without objecting to the sufficiency of the affidavit upon which the attachment issued, he waives an irregularity in that respect; and this is so, although he appeared specially for the purpose and took the objection on return of the attachment. *Id.*

* * * * *

APPEAL from an order of the county court of Oneida county, denying a new trial. The material facts are stated in the opinion

J. D. Kernan, for the appellant.

S. J. Burrows, for the respondent.

Present—Bacon, Foster, Morgan and Mullen, J. J.

By the Court, FOSTER, J. On the 17th day of June, 1868, the plaintiff appeared before Dexter Gilmore, a justice of the peace of the county of Oneida, and made oath in writing that Seth F. Benton was justly indebted to him, on a demand arising on contract in the sum of two hundred dollars over and above all discounts, &c. That Benton was not a resident of the county of Oneida, “and

that no warrant can issue against him on the demand of this deponent according to the act to abolish imprisonment for debt and to punish fraudulent debtors." He also gave bail pursuant to the said act and demanded that an attachment be issued.

The justice thereupon issued a short attachment in the usual form returnable before him, on the 19th day of the same month.

On the 17th day of June, the constable levied the attachment on certain personal property of the defendant in the possession of one Batley, as appeared by his return, and he further returned to the attachment that he did not find the defendant in the county, but that he was absent therefrom and that he had no residence therein.

At the time and place mentioned for the return of the attachment, the parties were called by the justice and the plaintiff appeared in person and by his attorney, and the defendant appeared by William P. Batley, *for the purpose of making objection to the process* and was sworn as to his authority and he objected to the attachment on the ground that the affidavit on which it issued was insufficient and the attachment wrongfully issued. The justice overruled the objection; the counsel for the defendant declined to appear and answer generally, and the justice issued a short summons returnable on the 22d of June. The constable returned the summons with his return thereon, by which it appeared that after diligent search the defendant could not be found in the county and had no residence therein.

On the 22d of June both parties appeared and the plaintiff claimed against the defendant in writing for work, labor and services done and performed for him by the plaintiff and demanded judgment in the sum of \$200. The defendant answered in writing denying the complaint and claiming that the work, labor and services, were performed by the plaintiff under a special contract for a specified sum. That the whole amount had been paid to him and that there was a balance due to the defendant of \$5.64 which he claimed to recoup; but no objection was then taken to the sufficiency of the affidavit on which the attachment was issued. Nor was any such objection afterwards made in the justice's court.

The action was afterwards tried before the justice and a jury and a verdict was rendered in favor of the plaintiff for \$126.25 for which judgment was rendered with costs.

The defendant appealed to the county court and in his notice of appeal desired *a new trial* in that court and stated as grounds of appeal that the judgment was contrary to the law and evidence of the case. That the justice erred in refusing to non-suit the plaintiff and in the admission of evidence and that the judgment should have been more favorable to the defendant.

In the county court when the case was called for trial, the counsel for the defendant moved that the judgment of the justice be reversed, on the ground that the affidavit on which the attachment issued was insufficient in that it did not sufficiently set forth the *facts and circumstances* upon which the application therefor was founded; and that in addition to the facts and circumstances set forth it should have set forth facts and circumstances which would have entitled the plaintiff to a long attachment had the defendant been a resident of the county. The counsel for the plaintiff objected to the motion upon the ground that it had been waived by appealing for a new trial, that the affidavit cannot be returned by the justice, and if returned it is unofficial and this court cannot act upon it, and that by appealing for "*a new trial*" the defendant waived all objection to the sufficiency of the affidavit upon which the attachment issued, and was estopped from raising the question at that time, in that court.

The court denied the motion and the defendant's counsel excepted.

It is quite clear that the county court, in denying the motion of the defendant's counsel, did not do so because the notice of appeal called for a new trial, for it had just before decided to entertain the motion, and in doing so had overruled precisely the same objections of the plaintiff's counsel as those above stated, and I have no doubt that in overruling the objection of the plaintiff's counsel the court was correct. The statute authorizes a party to a judgment in a justice's court to appeal to the county court upon questions of law *only* in which case no retrial is had, but the questions of law are to be decided upon the evidence and proceedings had before the justice as returned by him. Or, he may appeal for a new trial in which case the justice does not return the testimony taken before him but returns "the process by which the action was commenced with the proof of service thereof and the pleadings or copies thereof, the *proceedings* and judgment together with a brief state-

ment of the amount and nature of the claims litigated." While an appeal on questions of *law only* the justice returns the "testimony, *proceedings* and judgment." (*Code of Procedure*, § 360.)

I think it is clear that when a party appeals from a justice's judgment for a new trial he can in the appellate court raise all questions which were properly raised in the court below (except such as were raised to proceedings which took place on the *trial* of the action) as fully as he could do if the appeal were on questions of law only. The return of the justice in such case as we have seen, is quite as ample except in regard to the testimony as in the case of appeal on questions of law. Indeed unless the word *proceedings* covers everything that took place in the court below except "testimony" and "judgment" the return in the case a new trial is asked for is more comprehensive. For it contains in terms all that is provided for in a return on an appeal on questions of law only and also the "process," "proofs of service" and "pleadings." And yet I have no doubt that all these are covered by the word "proceedings" and that the returns in both classes of appeals are to be the same except as to the testimony and rulings upon the trial.

The reason for the determination by the appellate court of all questions of jurisdiction and of regularity which arose in the court below is the same in both classes of appeals—and if all such questions do not come up before the appellate court on an appeal for a new trial, the aggrieved party must either bring two distinct appeals from the same judgment, which surely cannot be done, or else the statute does not give the party an opportunity in the court above to retry all the questions which arose in the justice's court.

We do not know why the county court denied the motion to reverse the judgment, but it must have been either because it thought the affidavit on which the attachment was founded was sufficient, or that the question was not properly raised before the justice.

If the question were before us for adjudication I should have no hesitation in saying that the affidavit on which the attachment was issued was defective and did not give the justice jurisdiction to issue it. Not however, for one of the reasons stated by the defendant's counsel, that it did not state facts which as against a resident defendant would have authorized the issuing of a long attachment, for his proceeding was under the act of 1831 and did not as against

a non-resident require proof of any fraudulent or improper act on the part of the defendant to entitle the plaintiff to the attachment, * but only that the demand arose on contract; that the defendant was not a resident of the county and that no warrant under that act could issue against him—but I should hold it to be so because there were no facts or circumstances set forth to show that the demand was such that under the act in question, no warrant could be issued against him.

No fact or circumstance appeared in the affidavit from which it could be inferred that a warrant could not issue, except that the demand arose on contract, and yet in many cases of demands a warrant may issue under the act of 1831 although it arose on contract.

The affidavit should have shown how it arose on contract so that the justice could judge whether a warrant could issue or not, but as it was, the plaintiff swore to the law instead of the facts. Several authorities are cited on this question and the result of them all I think supports the view which I have taken of it, but I need not cite them for in my judgment no such question was in the case.

When the question was raised before the justice, there had been no service of the attachment, even admitting that it had been regularly issued—which would of itself give the justice jurisdiction of the parties.

The 37th section of the act in question provides, that if the attachment shall be returned personally served on the defendant, the justice shall on the return day proceed to hear, &c.

The 38th section provides, that if at the return day, it shall appear by the return that property was attached, and that a copy

* This *obiter dictum*, that the affidavit presented to a justice of the peace under the act to abolish imprisonment for debt as the basis for a short attachment need not state facts showing any fraudulent or improper act as required in the affidavit on an application for a long attachment, I think is not generally regarded as law. The object of the law is "to punish *fraudulent* debtors." It is for the relief of creditors liable to be *defrauded*. It would seem *essential* that fraudulent or improper acts should be set forth in the affidavit. (See page 88.) The object of that section of the law of 1831 authorizing the issuance of the short attachment, was to shorten the time of the running of the process and that, for the benefit of the *non-resident defendant*. It was not intended to change the character of the proof of fraud required for the issuance of a long attachment. It was not intended to punish a man for being out of the county of his residence when he was guilty of no fraud and to place him in a worse position than a resident debtor.

of the inventory and attachment was not personally served and the defendant shall not appear, the plaintiff may take out a summons against the defendant and if such summons shall be returned, that the defendant cannot be found after diligent inquiry, or that the same has been personally served upon the defendant, then, in either case, the justice shall proceed to hear, &c., as upon a summons returned personally served.

The objection to the sufficiency of the affidavit was taken on the return of the attachment not personally served.

The statute which I have set out authorized the justice to then proceed and hear the case, if the defendant appeared, and by the appearance the statute meant a general appearance, for without *such* appearance, no jurisdiction was acquired. And without such an appearance the defendant had no standing in the court, any more than he had at any time after the issuing of the attachment and before the return thereof, and the justice could not take jurisdiction to decide any question between the parties unless the defendant appeared in such manner as to confer jurisdiction; and if the defendant did not so appear, the only thing which the justice could do, as such, was to issue a summons in pursuance of the 38th section of the act. It is only upon the return of process, which purports to confer jurisdiction, that the defendant can appear specially and object to the regularity of the process.

In my judgment the only time the defendant could appear specially and object to the regularity of the attachment proceedings was on the return of the summons, and he could then have claimed that the attachment was irregular and jurisdiction was not conferred over him. This he did not do, but he appeared there generally and he voluntarily joined issue in the action upon the merits. If the objection in question had been taken then, and overruled, his immediately thereafter joining issue upon the merits, would not deprive him of the right to renew the objection in the county court, and also here.

He did not do so, but chose to raise it at a time, and in a way, which did not legally authorize the justice to pass upon it. And for aught that appears, the justice may have overruled his objection for the reason, that he had not then the right to determine the question. At all events, he should have raised the question on the return of the summons, and by joining issue then without objection,

he conferred jurisdiction, if without that, it had not been previously acquired.

* * * * *

The other judges concurring new trial granted, costs to abide event.

SUPREME COURT.

THE AGENT OF THE STATE PRISON AT MOUNT PLEAS-
ANT *v.* RIKEMAN & HUBBELL.

(1 *Denio*, 279. *Decided* 1845.)

In actions by and against the agents of the State prisons, as authorized by 2 R. S., 763, § 25, the individual name of the incumbent must be used, with the addition of his name of office.

When such suit was brought by the agent of one of the prisons in his name of office alone, the plaintiff was permitted to amend by prefixing his proper name to his official designation wherever it occurred, upon payment of costs.

Reynolds, for the defendants.

T. Nelson, for the plaintiff.

By the Court, BRONSON, Ch. J. A sufficient answer is given to the motion for judgment as in case of nonsuit, and it is denied, but the plaintiff must stipulate to try the cause at the next circuit to be held in the county of Westchester.

The motion to amend must be granted. It is settled that the *office* of supervisor cannot sue. (*Supervisor of Galway v. Stimson*, 4 *Hill*, 136.) And I am unable to comprehend how any *office* can either sue or be sued, though the person holding the office may have a capacity to do and suffer both. The law has provided in many cases that an officer may sue in his name of office; but still it is the officer, and not the office, who brings the suit, and so the matter must appear on the papers. The sheriff sues in his name of office — that is, in his proper name — adding his official designation.

It is said, however, that the statute relating to suits by and against the agents of State prisons (2 R. S., 763, § 25) is peculiar in its language and plainly prescribes a different rule. A careful

reading of the statute will show that this is a misapprehension. If, where the term "agent" is used, we read "the individual holding the office as agent," as the sense obviously requires, there will be no difficulty in reconciling the statute with the general principles of law in analogous cases. The contrary construction would produce singular incongruities. In the same section the office (as distinguished from the officer) would have "transactions and dealings on account of said prisons." Again, if the term "agent" means the office without the incumbent, then the office must give bail, take an oath, and do many things which can only be done by the individual. (§§ 21, 22, 23, 28.)

The relief must, however, be granted on payment of the costs of the circuit and of this motion.

Ordered accordingly.

SUPREME COURT.

WALTER K. MOORE AND WIFE v. JOHN W. SOMERINDYKE.

(1 *Hilton*, 199. *Decided* 1856.)

Upon judgment being given for the defendant, in an action commenced by attachment in the Marine Court, he is entitled to an immediate return of all property taken from him by virtue of the attachment.

And his right to such return is in no way suspended or affected by the plaintiff appealing from the judgment.

In a subsequent action by the defendant in the attachment to recover from the officer the property taken by him under it, it is no defence that the property in question has not been paid for by the defendant thus claiming its return.

* * * * *

APPEAL by defendant from a judgment of the Marine Court. The facts in this case are sufficiently stated in the opinion of the court.

Smith & Moody, for the appellant.

Townsend, Dyett & Raymond, for the respondent.

INGRAHAM, First Judge. This action is brought to recover from the defendant goods taken by him from Walter K. Moore, by

attachment issued in an action in the Marine Court, of Dwight Bishop v. Walter K. Moore. The action was tried, and judgment rendered for the defendant. From that judgment the plaintiff appealed, and the appeal is still pending.

* * * * *

The *second* objection is, that the testimony offered to show that the goods in question had not been paid for was improperly excluded. For the purposes of this suit it was immaterial. The action was not between the creditor and the purchaser. Their respective rights had been adjudicated in the action of *Bishop v. Moore*; and whether paid for or not, that fact could form no defence in an action against the officer to recover back from him property taken by him on attachment, in an action in which it had been decided that the plaintiff was not entitled to recover.

It is said that an appeal has been taken, which is undecided. That, however, is of no avail. The court below decided against the plaintiff in that action. If the judgment should be affirmed, the plaintiff would then have no claim. If it should be reversed, the attachment proceedings can be of no avail. The plaintiff would be compelled to commence a new action, to enforce his claim against Moore. There is no provision of law by which the goods levied on under that attachment could be held liable for the recovery in the new action.

There are difficulties attending this case, and, in its present form, if they had been made grounds of appeal, would have presented serious objections to the judgment. The wife should not have been made a plaintiff. The other plaintiff, being the party in possession when the goods were taken, had a right to bring the action, and was entitled to a return of the property, and the evidence is sufficient to sustain his title. The duty of the officer was to take the property, and keep the same to satisfy any judgment that might be recovered on the attachment. As soon as it was established that no judgment could be recovered thereon in favor of the plaintiff, the right to retain the goods ceased, and the defendant in the attachment was entitled, upon demand, to have them restored to his possession. Her name, however, can be stricken out as plaintiff, even after judgment.

* * * * *

Judgment affirmed.

SUPREME COURT.

ROBERT J. WILDE v. THE NEW YORK AND HARLEM RAILROAD
COMPANY.

(1 *Hilton*, 302. *Decided* 1857.)

An action may be commenced in a district or justice's court against a resident corporation by a short summons, when the plaintiff is a non-resident and furnishes the requisite bond and affidavit.

* * * * *

APPEAL by defendants from a judgment of the Second District Court. This action was commenced by a short summons, the plaintiff being a non-resident and giving security. On the return day the defendants appeared and moved to dismiss the suit upon the ground that the defendants could only be sued by a long summons. The objection was overruled, the defendants answered, and the cause was thereafter twice adjourned. On the final adjourned day the defendants failed to appear, and judgment was rendered against them by default. From that judgment they appealed, and on the appeal offered affidavits showing a defence upon the merits and an excuse of their default.

Odle Close, for the appellants.

Stillwell & Swain, for the respondent.

BRADY, J. The Code, section 53, confers civil jurisdiction in certain actions, of which the present is one; and section 54 declares that no justice of the peace shall have cognizance of a civil action in certain cases, not including, however, actions against corporations. The constitution, sect. 3 of art. 8, declares that corporations shall have the right to sue and shall be subject to be sued in all courts, in like cases as natural persons. There can be no doubt that an action can be entertained by a justice against a resident corporation, and, as we shall see, that such corporation may be sued, by a non-resident plaintiff, by short summons. The 32d section of the act abolishing imprisonment for debt (Session Laws, 1831, p. 403) provides, that whenever, by the provisions of

section 31 of that act, no warrant can issue (and in this action no warrant could issue against the defendants), and the plaintiff shall be a non-resident of the county, and shall give like proof of the fact, and shall give the security required by law, the justice shall issue a summons, which may be made returnable not less than two or more than four days from the date thereof, and shall be served, &c. In this case the plaintiff was a non-resident, and complied with the statute on obtaining the summons, and the court below acquired jurisdiction of the cause. This disposes of the objections to the validity of the plaintiff's judgment.

* * * * *

Judgment affirmed.

SUPREME COURT.

WHILEY & WHILEY v. SHERMAN AND OTHERS.

(3 *Denio*, 185. *Decided* 1846.)

In an action on a bond pursuant to 2 R. S. 231, § 33, by a party claiming property which had been seized on an attachment, the plaintiffs need not show jurisdiction in the justice to issue the attachment.

ERROR to the Kings common pleas. Whiley & Whiley sued Sherman and other defendants in error before a justice of the peace, in debt on a bond in the penal sum of \$185. It recited that the plaintiffs had procured an attachment to be issued by a justice of the peace against one Plant, upon which certain goods had been seized as the property of Plant, but which were claimed by Sherman, and was conditioned to be void if Sherman should establish that he was the owner of the goods seized, at the time of such seizure, in a suit to be brought on the bond within three months from its date, or in case of his failure to do so, should pay the value of the goods with interest. (2 R. S. 321, § 33.) The defendants pleaded *non est factum*, and that Sherman was the owner of the goods; and gave notice of special matter.

The plaintiffs recovered before the justice and the defendants appealed. On the trial of the common pleas, the plaintiffs proved

the execution of the bond and gave other evidence, and were about to prove the value of the property attached, when the defendants objected that the plaintiffs were about to show jurisdiction in the justice to issue the attachment. The court sustained the objection, and the evidence suggested not being given, they charged the jury to find for the defendants. The plaintiffs' counsel excepted, and the defendants had a verdict, upon which judgment was entered.

C. C. Egan, for the plaintiffs in error.

F. R. Sherman, for the defendants in error.

By the Court, JEWETT, J. To entitle the plaintiffs to recover it was only necessary for them, under the pleadings, to prove the execution of the bond by the defendants, and the value of the goods seized and delivered to the claimant. They proved the bond, but failed to prove the value of the property, the court having decided that such testimony was improper until the plaintiffs had produced the attachment and shown that the justice had jurisdiction to issue it. This decision is supposed to be sustained by the case of *Homan v. Brinkerhoff*, (1 *Denio*, 184.) In that case it appeared affirmatively by the evidence, that the justice did not acquire jurisdiction to issue the attachment, and that it was void. It was not then held that in order to recover upon such a bond it was necessary for the plaintiff to show that the attachment was regularly issued, but only that where it was proved that the attachment was void, the plaintiff could not recover upon the bond. The judgment must be reversed.

Judgment reversed.

SUPREME COURT.

COOK & PIERCE v. MCDOEL.

(3 *Denio*, 317. *Decided* 1846.)

In a suit by attachment prosecuted against two persons as joint debtors in the court of a justice of the peace, it is not enough that a proper return by the constable should be made of the service of the attachment upon one of them; and where such return as to one was made and nothing was said in it as to any service on the other defendant, the judgment was reversed.

ERROR to the Oneida C. P. McDoel recovered a judgment against Cook & Pierce before a justice of the peace, which the common pleas affirmed on *certiorari*. The suit was commenced by attachment, and the return of the constable stated that he had attached certain property which he described and had made an inventory, and that he served a copy of the attachment and of the inventory *on the defendant Cook*, on a day named. Nothing was said of any service upon the other defendant. Cook appeared and made objections to the return, which were overruled. Pierce did not appear. Issue was then joined and a trial had. The judgment was against both the defendants as joint debtors.

S. H. Stafford, for the plaintiffs in error.

J. W. Jenkins, for the defendant in error.

By the Court, JEWETT, J. The statute requires that the constable, on the seizure of the property on attachment, shall immediately make an inventory of it and leave a copy of the attachment and of the inventory, certified by him, at the last place of residence of the defendant; and if he has no place of residence in the county where the goods are attached, to leave such copy and inventory with the person in whose possession the goods were found. (2 *R. S.* 231, § 31.) By § 36 of the act of 1831 (*stat. p.* 404) it is required that every attachment issued by virtue of that act or of the provisions contained in the revised statutes shall be served in the manner provided for by the revised statutes, except that if the defendant can be found in the county, the copy of such attachment and inventory shall be served upon him personally,

instead of leaving the same at the place prescribed by the revised statutes; and the return of the officer, in addition to what was before required, shall state specifically whether such copy was or was not personally served upon the defendant.

I think that the objection is well taken. It was the duty of the constable to have served the copy of the attachment and inventory on Pierce personally, if he was to be found in the county, or if not, to have left the same at his last place of residence, if he had a residence in the county; and if he had no residence, to have left the same with the person in whose possession the goods attached were found; and to have stated in his return the manner of such service. The return in this case shows nothing in regard to the service of the attachment on Pierce. For this reason the judgment must be reversed.

Judgment reversed.

SUPREME COURT.

CONWAY v. HITCHKINS.

(9 Barb., 378. Decided 1850.)

The appearance of a defendant before a justice, by attorney, on the return of an attachment, supersedes the necessity of a summons, and gives the justice jurisdiction of the cause.

An appeal from the judgment of a justice of the peace, not followed up by the giving of the undertaking required by the code, (§§ 355, 356, 357,) will not operate as a stay of any further proceedings which the plaintiff may elect to pursue, in order to enforce the collection of the judgment.

* * * * *

THE affidavit on which the present motion was founded, stated that the judgment before the justice was obtained on the return of an attachment, not personally served, and that no summons was issued by the justice, as required by the 38th section of the non-imprisonment law. (*Laws of 1831, p. 404.*) That the property seized under the attachment was of the value of \$70. That the judgment before the justice had been duly appealed from the county court, and the papers served on the justice on

the 29th of May, 1850, and that the order to appoint a referee was obtained ex parte and without notice.

The opposing affidavits showed that the defendant appeared before the justice on the return of the attachment, and pleaded to the action, and the cause was tried and judgment was given on the whole merits on the 11th of May, 1850; that an execution was issued thereon by the justice to the same constable who served the attachment, who returned it *nulla bona*, &c., and that the property taken on the attachment did not belong to the defendant; that on the 13th of May, 1850, a transcript of the judgment was sent to the county clerk's office, and filed on the 15th of May, 1850. That the defendant did not serve his affidavit of appeal on the justice until the 31st of May, and did not give the security required by the code (§§ 355, 356, 357,) to entitle him to a stay of the proceedings.

Gibson & Davis, for the defendant.

F. Park, for the plaintiff.

By the Court, WILLARD, J. The appearance of the defendant before the justice by attorney, on the return of the attachment, superseded the necessity of a summons to the defendant, and gave the justice jurisdiction of the cause. This is necessarily implied from the language of the 38th section of the act to abolish imprisonment for debt in certain cases. (*Laws of 1831, p. 404.*) The objection that property was seized under the attachment sufficient to satisfy the judgment, is answered by the return of the constable, that it did not belong to the defendant, and by the return of the sheriff, that the defendant had no goods and chattels, &c. The appeal, not having been followed up by the undertaking required by the code, (§§ 355, 356, 357,) did not operate as a stay of any further proceedings which the plaintiff might elect to pursue, in order to enforce the collection of the judgment.

* * * * *

The motion therefore must be denied, with ten dollars costs.

SUPREME COURT.

FROST & RIDER v. WILLARD.

(9 Barb., 440. Decided 1850.)

An affidavit, made by a plaintiff to a justice of the peace, upon applying for an attachment against a defendant, stating that the application is made on the ground that the defendant "has assigned or secreted his property *with intent to defraud his creditors*," although according to the words of the statute, is insufficient, unless the facts and circumstances stated therein are enough to justify a belief that the defendant has assigned or secreted his property with intent to defraud his creditors.

* * * * *

* * * * *

ON the part of the defendant was offered in evidence the records of proceedings in a justice's court before John E. McVine, esquire, consisting of an application in writing, an affidavit, the requisite bond, attachment against Foley, inventory, return, judgment and execution and the return thereon; by which records it appeared that the attachment was issued on the 25th day of November, 1846, and was returnable the 6th day of December, 1846, before the said John E. McVine, esquire, a justice of the peace of said county of Essex, residing in Moriah. It also appeared that the same was issued under the act to abolish imprisonment for debt and to punish fraudulent debtors; and that there was no appearance on the part of the defendant Foley in said suit. The plaintiff's counsel objected to the introduction of said proceedings, on the ground that the affidavit on which the attachment was issued was informal and insufficient, and did not contain the requisite facts to give the justice jurisdiction and authority for issuing it; and that although, as a general rule, process regular on its face is sufficient for the protection of the officer, even if issued without authority, yet that inasmuch as the officer attempted to overthrow the sale of Foley, the debtor, on the ground of fraud, he must go back of his process of attachment, and show authority for issuing it, as the plaintiffs claimed under an older and better title, unless it could be impeached for fraud. The judge sustained the objection, and decided that the affidavit was insufficient to authorize the issuing of said attach-

ment and to give the justice jurisdiction of said cause, and therefore the sale of Foley could not be impeached for fraud ; but that he would admit the attachment, judgment, proceedings and execution for the purpose of connecting the defendant with Foley, the debtor, showing a title derived from him, and the same was admitted by his honor the judge for that purpose ; to which decision the defendant's counsel excepted.

* * * * *

M. T. Clough, for the plaintiffs.

Jonathan Tarbell, for the defendants.

By the Court, Cady, J. The first inquiry is, was the affidavit sufficient to warrant the attachment ? It is stated in the affidavit "that the application for an attachment against the property of the said Bartholomew Foley which accompanies this affidavit, is made on the ground, that the said Bartholomew Foley has assigned or secreted his property *with intent to defraud his creditors.*" This is according to the words of the statute, but it is not to be supposed that the deponent intended to swear to a fact within his knowledge, that Bartholomew Foley had *assigned or secreted his property with intent to defraud his creditors.* Bartholomew Foley's intent could not be known to the deponent ; and an affidavit in the words of the statute has repeatedly been held insufficient. (*Ex parte Robinson*, 21 Wend., 672.) In that case proceedings were had against an absconding debtor. And by the statute (1 R. S., 765, § 1), authorizing such proceedings, an application must be made in writing, verified by the affidavit of the creditor, stating amongst other things, "the grounds upon which the application is founded." "The facts and circumstances to establish the grounds on which such application is made shall also be verified by the affidavit of two disinterested witnesses." The witnesses, in that case, stated that the debtor "*had left the state with intent to defraud his creditors.*" That was the fact to be proved ; yet the court held the affidavit insufficient, because the *facts and circumstances* stated in the affidavit did not prove the grounds upon which the application was made.

In the case before the court, it is alleged in the affidavit that the

application for the attachment was made "on the ground that the said Bartholomew Foley had assigned or secreted his property with intent to defraud his creditors;" and the affidavit was insufficient unless the facts and circumstances stated therein were sufficient to justify a belief that the debtor *had assigned or secreted his property with intent to defraud his creditors*. I have read the affidavit attentively, and cannot discover that the deponent has stated a single fact or circumstance intending to prove that the debtor had either assigned or secreted his property with intent to defraud his creditors. The affidavit furnishes no evidence that Foley *had assigned or secreted his property at all*. The affidavit shows that the object in obtaining the attachment was to prevent the barrels which Foley had made and was making from being transported to Vermont.

Although the affidavit was insufficient, the attachment would have protected the defendant against any action which might have been brought by Foley. But the attachment only authorized the defendant to take the goods of Foley. The barrels in question were the property of the plaintiffs, as between them and Foley; and the defendant, in order to make out a defense, must show that the barrels were the property of Foley, as between them and Foley, and the defendant, in order to make out a defense, must show that the barrels were the property of Foley, as between him and the plaintiffs. The judge rightfully decided that the affidavit was insufficient.

* * * * *

The motion for a new trial must therefore be denied.

SUPREME COURT.

ANDREWS & HARKNESS, OVERSEERS OF THE POOR OF THE TOWN OF
POTTER, v. HARRINGTON.

(19 *Barb.*, 343. *Decided* 1855.)

A summons issued by a justice of the peace, in an action brought to recover penalties for violations of the excise law, was indorsed "Issued according to the *proceedings* of title nine, chapter 20th, part first of the revised statutes." *Held*, that this was a substantial compliance with the section of the statute (2 R. S. 481, § 7) requiring process in suits for penalties to be indorsed according to the *provisions* of the statute by which the right of action is given.

* * * * *

APPEAL from a judgment in Yates County Court, affirming the judgment of a justice of the peace. The action before the justice was brought to recover several penalties for violations of the excise law. The facts are sufficiently stated in the opinion of the Court.

J. D. Wolcott, for the appellant.

James Taylor, for the respondents.

By the Court, WELLES, J.

* * * * *

The objection now taken, that the summons was improperly indorsed, cannot be maintained. The indorsement was as follows: "Issued according to the *proceedings* of title nine, chapter twentieth, part first of the revised statutes." This I think was a substantial compliance with the statute, which uses the word "provisions," instead of "proceedings." (2 R. S. 481, § 7.)

* * * * *

The judgment of the County Court is therefore affirmed.

COURT OF OYER AND TERMINER.

PHILADELPHIA, OCTOBER, 1784.

RESPUBLICA *v.* DE LONGCHAMPS.(1 *Dall.* 111.)

CHARLES JULIAN DE LONGCHAMPS, generally known as Chevalier de Longchamps, was indicted for threatening in the dwelling-house of his Excellency, the French Minister Plenipotentiary, bodily harm and violence, on the 17th of May, 1784, to the person of Francis Barbe Marbois, Consul General of France to the United States; consul for the State of Pennsylvania, and Secretary of French Legation. And for assaulting on the 19th of May, 1784, the said Marbois, in the public street, &c., in violation of the laws of nations, and against the peace and dignity of the United States and of the Commonwealth of Pennsylvania. The defendant pleaded not guilty. The jury rendered a verdict of guilty.

McKEAN, Ch. J., in passing sentence said :

* * * * *

The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world.

All the reasons which establish the independency and inviolability of a minister, apply likewise to secure the immunities of his house. It is to be defended from all outrage; it is under a peculiar protection of the laws; to invade its freedom is a crime against the state and all other nations.

The comities of a minister, or those of his train, partake also of his inviolability. The independency of a minister extends to all his household; these are so connected with him that they enjoy his privileges and follow his fate.

The Secretary of the Embassy has his commission from the Sovereign himself; he is the most distinguished character in the suit of a public minister, and is in some instances considered as a

kind of public minister himself. Is it not then an extraordinary insult to use threats of bodily harm to his person in the domicile of the Minister Plenipotentiary? If this is tolerated, his freedom of conduct is taken away, the business of his Sovereign cannot be transacted, and his dignity and grandeur will be tarnished. You then have been guilty of an atrocious violation of the law of nations; you have greatly insulted gentlemen, the peculiar object of this law (gentlemen of amiable characters and highly esteemed by the government of this state) in a most wanton and unprovoked manner; and it is now the interest as well as the duty of the government to animadvert upon your conduct with a becoming severity—such a severity as may tend to reform yourself, to deter others from the commission of a like crime, preserve the honor of the State, and maintain peace with our great and good ally, and the whole world.

A wrong opinion has been entertained concerning the conduct of Lord Chief Justice Holt and the Court of King's Bench in England, in the noted case of the Russian Ambassador. They detained the offenders, after conviction, in prison, from term to term, until the Czar Peter was satisfied, without ever proceeding to judgment; and from this it has been inferred that the court doubted, whether they could inflict *any punishment* for an infraction of the law of nations. But this was not the reason. The Court never doubted that the law of nations formed a part of the law of England, and that a violation of this general law could be punished by them; but no punishment less than *death*, would have been thought by the Czar an *adequate* reparation for the arrest of his Ambassador. *This* punishment they could not inflict, and *such* a sentence, as they could have given, he might have thought a fresh insult. Another expedient was therefore fallen upon. However, the princes of the world, at this day are more enlightened, and do not require impracticable or unreasonable reparations for injuries of this kind.

* * * * *

Upon the whole the Court, after a most attentive consideration of every circumstance in this case, do award and direct me to pronounce the following sentence:

That you pay a fine of one hundred French crowns to the Com-

monwealth ; that you be imprisoned until the fourth day of July, 1786, which will make a little more than two years' imprisonment in the whole ; that you then give good security to keep the peace, and be of good behavior to all public Ministers, Secretaries to Embassies, and Consuls, as well as to all the liege people of Pennsylvania, for the space of seven years, by entering into a recognizance, yourself in a thousand pounds and two securities in five hundred pounds each ; that you pay the costs of this prosecution and remain committed until this sentence be complied with.

SUPREME COURT OF PENNSYLVANIA.

DUPON *v.* PICHON.

(4 *Dall.*, 321. *Decided* 1805.)

A *capias* was issued at the suit of the plaintiff, against the defendant, in an action upon the case, &c. Upon its return the judges of the Supreme Court ordered the defendant discharged on common bail, and that the next Supreme Court in Bank consider whether or not the defendant be discharged from the process against him. Upon the opening of that court Dallas and Du Ponteau asked the discharge of the defendant. The credentials of Mr. Pichon's were then produced, when it appeared that he was Commissary General of Commercial Relations, and Chargé d'Affaires of the French Republic. He was to fulfill the duties of the latter office, however, only until a Minister Plenipotentiary should arrive in the United States from France. By the deposition of Mr. Pichon it further appeared that General Toureau, the Minister, arrived in the United States about the 12th of Nov. 1804 ; that Mr. Pichon had been endeavoring to arrange his business so as to return to France with his family ; that that business was of an official character and related to his office as Chargé d'Affaires ; that his detention in this country was further owing to a delay in receiving his public papers and documents ; that he was

anxious to return to France but as yet could not, on account of his official business.

The court were of opinion that Mr. Pichon was privileged as a Chargé d'Affaires and he was therefore discharged.

SUPREME COURT.

ADAM BROWN AND OTHERS v. FREDERICK A. ASHBOUGH.

(40 *Howard*, 260. *Decided* 1870.)

Erie Special Term, September, 1870.

THIS was a motion to vacate the attachment. Sufficient facts are stated in the opinion.

John Douglas, attorney for the plaintiff.

C. C. Sprague, of counsel.

Nichols & Robbins, for the defendant.

MARVIN, J. The substance of the statement made by the defendant in his affidavit is, that on the 24th day of September, 1870, he left the city of Hamilton, Canada, and on the 26th came to the State of New York, with the intention of taking up his residence therein; that he arrived on that day in the city of Lockport, where he remained over night and a portion of the next day, and then went to Tonawanda and transacted some business, and remained there until October 3d, when he came to the city of Buffalo, with the intention, in good faith, to reside there permanently; that he left Hamilton with the intention of not returning thereto, but in good faith of taking up his permanent residence in the city of Buffalo. He spoke of his brother's visit to him in Lockport, and his endeavors to persuade him to return to Hamilton, and his refusal to do so, and his declarations to his brother of his intentions not to return but to take up his residence in Buffalo; his brother visited

him in Buffalo, October 3d, and a like interview was had with the like result, and that he stated to his brother his intention of having his wife and household goods removed to Buffalo, and he requested his brother to take steps to effect this; that October 3d he took up his residence permanently in Buffalo, and ever since has resided in Buffalo. That just prior to his arrest he wrote to his wife that he had taken up his residence in Buffalo, and requested her to come to him; he was then endeavoring to rent a house in Buffalo for himself and family, and that his wife would have come to Buffalo to reside with him, within a day or two, if he had not been arrested. (The arrest was in this action upon the alleged ground of fraud in contracting the debts.) That at these times, he did not anticipate the commencement of any action against him. His brother, Roderick, made an affidavit confirming the statement of the defendant, as to the conversations between them at Lockport and in Buffalo. That the wife and family of the defendant, at the time of the arrest, were intending to move to Buffalo, and would have done so, but for the arrest, the day after such arrest.

The affidavits read in opposition to the motion, show that the defendant and his wife and her father, were British subjects and resided for a long time in Hamilton, where the defendant was doing business, and where he had, with his family, a fixed residence; that his family remained until after the commencement of this action; that the defendant was insolvent, and that his effects in Hamilton are being administered under the insolvent laws there in force. That he left Hamilton on the 24th day of September, for the United States, and a strong belief is expressed, that when the defendant went to the United States, he went to see whether he could find a place to establish himself in business, and not with the intention of fixing his abode at any particular place, but with the view and intention of going about and searching from place to place, to see if he could discover any convenient place of residence.

This was an *action*, as appeared from the affidavit presented to the officer, in which an attachment was proper. It arose on contract for the recovery of money, and an attachment was proper "against a defendant who was not a resident of this State." If the defendant was at the time, a *resident* of the State, then the attachment was unauthorized.

The defendant's residence and domicile were certainly in Hamil-

ton, Canada, on the 24th of September, 1870, and they had, for a long time, been there. The defendant was born in Canada and was a British subject. One of the rules (the 16th) stated by *Story* (*Conf. of Laws*, 47), is that a domicile once acquired, remains until a new one is acquired. The instant the new one is acquired the previous domicile ceases. It is a rule that every person has a domicile somewhere, and he can have but one at the same time, for one and the same purpose (5 Pick., 589). Residence is defined in *Burrill's L. D.*, to be "one who has a seat or settlement in a place; one who dwells, abides, or lives in a place, an inhabitant, one who resides or dwells in a place for some time," &c. *Bouvier's L. D.* "Domicil is the place where a person has fixed his ordinary dwelling, without a present intention of removal." To constitute a domicile two circumstances must unite, viz.: actual residence and an intention to remain. *Bouvier* defines "residence" the place of one's domicile.

Chancellor Walworth in *Matter of Wrigley* (8 Wend., 140), says *inhabitaney* and *residence* mean a fixed and permanent abode or dwelling place for the time being, as contradistinguished from a mere *temporary locality* of existence.

By *Story's 7th Rule*, 45, if a man removes to another place, with an intention to make it his permanent residence, it becomes instantaneously his place of domicile.

The original domicile is not gone until a new one has been actually acquired.

In this case I have no doubt the defendant left Canada (some of the affidavits say absconded), with a fixed intention not to return. He had been in business in Hamilton, something more than two years. He was insolvent. He says sold all his stock in trade. I also think he, at the time, intended to fix his residence in this state, he says in Buffalo. The abandoning of one's residence, even with the intention of not returning, is not ordinarily enough to destroy the domicile. Another domicile or residence must be acquired. Indeed under our statute the attachment goes against any one "who is not a resident of this state." My difficulty is in deciding whether the defendant had on the 11th day of October, *become a resident* of the state. I have, with some hesitation, come to the conclusion, that the defendant had become a resident of the state. His *intention* to abandon his

residence in Canada is clear, and it is, I think, equally clear that he intended to establish a residence in this state. The question is had he done so. Was his residence in Buffalo actually *established*, so as to satisfy the rule of *actual residence* and intention to remain. He had been *living*, stopping in Buffalo from October 3d to October 11th. He had avowed his settled purpose to remain there, he had been making efforts to procure a residence for his family, and a place for business — he had made some arrangements for the removal of his family from Hamilton to Buffalo. He had furnished no evidence, by conversations or otherwise, of his intention to leave Buffalo for some other place, or of any doubt about his remaining in Buffalo. It will be seen on examining some of the cases (above referred to and others) that the question was whether the residence, in a particular place, had been established; whether Buffalo, for instance, in the language of Chancellor Walworth, had become “a fixed and permanent abode or dwelling place for the time being” of the defendant, as contra-distinguished from a mere temporary locality of existence. Upon this question, *Frost* agt. *Brisbin*, 19 *Wend.*, 11; *Burrows* agt. *Miller*, 4 *How.*, 349; *Lee* agt. *Stanley*, 9 *How.*, 272, may be consulted. See, also 10 *How.*, 272; *Hurlbert* agt. *Seeley*, 11 *How.*, 507. In some of the affidavits read in opposition to the motion the affiants expressed the belief that the defendant went to the United States to see whether he could find a place to establish himself in business, and not with the intention of fixing his abode at any particular place, but with the view and intention of going about and searching from place to place, to see if he could discover any convenient place of residence. No facts are stated in support of this theory, and none appear in the case. As a question of fact I think I must hold that the defendant had become a resident of Buffalo, and that his residence in Hamilton had ceased. It follows that the attachment must be set aside.

SUPREME COURT.

BENTLEY AND OTHERS v. SMITH AND OTHERS.

(3 *Caines*, 169. *Decided* 1805.)

A promissory note to A. B. C. D. E. F. & Co. though there be no other persons in the firm, cannot be declared on by them with the addition of & *Company*, but their individual names must be stated, with the usual description of trading under the style, &c. ; if otherwise, it is bad on general demurrer.

ON a promissory note to *Thomas Bentley, Allen Potter, John P. Becker & Co.*, the declaration commenced in this way :

Albany, to wit : *Thomas Bentley, Allen Potter, John P. Becker & Co.*, complain, &c. To this a general demurrer.

*Foot*e insisted, that it was evident on the face of the record, that there were other persons not mentioned who ought to have been joined. Such a circumstance, if proved on a trial, would have prevented a recovery, and was equally fatal on general demurrer.

Crary, contra, was stopped by the court.

Per Curiam. Stating that the plaintiffs named and company complain, is acknowledging that other persons ought to sue. Did the defendants even acknowledge there were no others, this mode of declaring ought not to be suffered. Why did you not say *Thomas Bentley, Allen Potter, and John P. Becker*, trading under the style and firm of *T. B., A. P., J. P. B. & Co.* ?

The demurrer is well taken, (a) and the defendants entitled to judgment. But the plaintiffs may amend on payment of costs.

(a) If a plaintiff have the same christian name as the defendant, and after stating the names of each party correctly, and at full length, use the christian name only, as "the said *James* being in custody," it is certain to a common intent, and good on special demurrer. *Hildreth v. Harcey*, July, 1801. — *Kent, Ch. J.* But had the christian names been different, and that of the plaintiff used for the defendant, it would have been fatal even on general demurrer. *Harvey v. Stokes*, *Willes*, 5.

SUPREME COURT.

BLOOM AND OTHERS v. BURDICK.

(1 *Hill*, 130. *Decided* 1841.)

* * * * *

Where a statute prescribes the mode of acquiring jurisdiction over the person, that mode must be complied with, or the proceeding will be a nullity.

* * * * *

A statute authority by which one may be deprived of his estate, must be strictly pursued.

* * * * *

* * * * *

C. Humphrey, for defendant.

B. Johnson, for plaintiffs.

By the Court, BRONSON, J.

* * * * *

The Surrogate undoubtedly acquired jurisdiction of the *subject matter*, on the presentation of the petition and account; but that was not enough. It was also necessary that he should acquire jurisdiction over the *persons* to be affected by the sale. It is a cardinal principle in the administration of justice, that no man can be condemned or divested of his right, until he has had the opportunity of being heard. He must, either by serving process, publishing notice, appointing a guardian, or in some other way, be brought into court; and if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the court had undertaken to act where the subject matter was not within its cognizance. (*Borden v. Fitch*, 15 *John. R.* 121. *Bigelow v. Stearns*, 19 *id.* 39. *Mills v. Martin*, 19 *id.* 7.) This is the rule in relation to all courts, with only this difference that the jurisdiction of a superior court will be presumed until the contrary appears; whereas an inferior court, and those claiming under its authority, must show that it had jurisdiction. (*Foot v. Stevens*, 17 *Wendell*, 483. *Hart v. Seixas*, 21 *id.* 40.) The Surrogate's court is one of inferior jurisdiction; it is a mere

creature of the statute. (*Dakin v. Hudson*, 6 Cowen, 221.) Indeed, it has been held in all cases relating to Surrogates' sales, that the person claiming under them must show affirmatively that the officer had acquired jurisdiction. The distinction between the superior and inferior courts is not of much importance in this particular case, for whenever it *appears* that there was a want of jurisdiction, the judgment will be void, in whatever court it was rendered.

* * * * *

New trial denied.

SUPREME COURT.

BROOKS v. PATTERSON.

(2 *Johns. Cases*, 102. *Decided* 1800.)

An attorney of this court, who had ceased to practice for a year, and had entered the army of the United States, was held to have lost his privilege.

Munro, for the plaintiff.

Riker, for the defendant.

Per Curiam. If an attorney ceases to practice for a year, not in consequence of any temporary absence or avocation, but by betaking himself to a profession or business, incompatible with his practice as an attorney, the season of his privilege ceases. Attendance is the ground and foundation of the privilege. The object is, that attorneys may not be drawn into other courts, or to other business, to the injury of the suitors. (See 2 *Wils.* 231, 232. 4 *Burr.* 2113, &c. 1 *Vent.* 1. 2 *Lutw.* 1664.) The privilege is that of the court, for the sake of public justice, and is not intended as an accommodation to the individual. Here it appears upon the record, that the defendant had become an officer of the army, and had ceased to practice for a year.

It would be inconvenient and an abuse of the end of privilege, to

allow it in this case, notwithstanding the name of the defendant still remains on the rolls of the court.

We are of opinion, therefore, that judgment must be rendered for the plaintiff.

Judgment for the plaintiff. (a)

SUPREME COURT.

JOHN ANDERSON AND OTHERS v. CLEMENTINE O'REILLY.

(54 Barb., 620. Decided 1869.)

By the Court, CARDOZO, J. The appellant moved, at special term, to vacate a warrant of attachment which had been issued against her property. She made no affidavit to support the motion, but relied upon the alleged insufficiency of the plaintiff's affidavit; and of course, therefore, the only question presented by the appeal is, whether, conceding the facts stated in the plaintiff's affidavit to be true, a case to warrant the issuing of an attachment was made out. I am clearly of opinion that it was. The substance of the affidavit is, that when called upon, on several occasions, to pay the plaintiff, the defendant put it off, stating that her husband, every night, took all the money which she had received during the day, and paid it to persons in the city of New York from whom she had bought goods. The payment to such persons is disproved by the affidavit; so it stands conceded that the defendant has allowed her husband to take possession of all her money, and has made a false statement of the purpose to which it was appropriated. No other inference can be drawn, than that such disposition of the defendant's money, coupled with a falsehood as to the purpose for which he took it, was made with intent to defraud her creditors, whom she put off upon the false pretext which she assigned. The defendant, therefore, is amenable to the charge of having "disposed

(a) Grah. Prac. 2d ed., 38. In *Ogden v. Hughes*, 2 Southard, 718, it was decided that an attorney is privileged from arrest, unless his privilege be taken away by rule, though he do not show that he has acted as attorney within a year. See however, 3 Cow., 22.

of" her "property with intent to defraud" her creditors, and that being so, the plaintiff was plainly entitled to the warrant, under the provisions of the 229th section of the Code. The sole question is one of construction of the language of the affidavit, and I think the judge below interpreted it exactly right, and that his order should be

Affirmed with costs.

SUPREME COURT.

BISSELL v. BISSELL.

(11 Barb., 96. Decided 1851.)

In matters of *practice*, merely, the day on which any rule is entered, or order, notice, pleading or paper is served, is to be excluded in the computation of time for complying with the exigency of such rule, order, &c. ; and the day on which a compliance therewith is required must be included, except where it falls on a *Sunday* ; in which case the party has the next day to comply therewith.

But in respect to the construction of *statutes*, the rule is otherwise, in this State. Accordingly where, under the statute requiring judgments before justices of the peace to be rendered within four days after the submission of the cause, a cause was submitted to a justice on the 28th of June, and judgment was rendered on Monday, the 3d day of July following: *Held* that the same was void, as not being entered in season.

THIS was an appeal by the defendant from a judgment rendered by the Oneida county court, affirming the judgment of a justice of the peace in favor of the plaintiff.

W. S. Parkhurst, for the appellant.

J. M. Carroll, for the respondent.

By the Court, GRIDLEY, J. By the 124 section of the act entitled, "of courts held by justices of the peace," it is enacted that "in cases where a plaintiff shall be non-suited, discontinue or withdraw his action, &c., the justice shall forthwith render judgment

and enter the same in his docket. In all other cases he shall render judgment and enter the same in his docket within four days after the cause shall have been submitted to him for his final decision." In the case under consideration, the cause was submitted to the justice on the 28th day of June, 1848, and judgment was rendered on Monday, the third day of July following, in favor of the plaintiff. The single question is whether the judgment was entered in season.

Were this a matter of practice merely there could be no doubt that the judgment must be held regular. By the sixty-second rule of the Supreme Court, as well as by several adjudged cases, the day on which any rule shall be entered, or order, notice, pleading or papers served, shall be excluded in the computation of time for complying with the exigency of such rule, order, notice, pleading, or paper; and the day on which a compliance therewith is required, shall be included; *except when it shall fall on a Sunday, in which case, the party shall have the next day to comply therewith.* (2 *Hill*, 377, note. 3 *John. Rep.* 261. 10 *Wend.*, 560.) The same rule prevails in England. In matters of practice, in all cases in which any particular number of days (not expressed to be clear days,) is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last shall happen to fall on a Sunday, Christmas day or Good Friday, or a day appointed for a public fast, or thanksgiving; in which case the time shall be reckoned exclusively of that day also. (See 1 *Dowl. P. C.* 200; 8 *Bing.* 307; 3 *B. & Adol.* 393; 2 *Tyr.* 351; 4 *Bligh. N S.*, 608, cited in *Harrison's Digest*, 3d vol. p. 6328.) So also, an execution will be defeated by a writ of error filed within the first *four days*, exclusive of Sunday, after judgment is perfected. (1 *Cowen*, 15; 7 *Id.* 418.) And the same rule holds in the old practice, of entering judgment *nisi*. The four days within which a party might move in arrest, were four juridical days — Sunday not being counted. (11 *East*, 272. 13 *Id.* 21. 4 *Burrow*, 2130. *Graham's Pr.* 296.)

In respect to the construction of *statutes* the rule is otherwise, in this state. In the case of *Ex parte Dodge*, (7 *Cowen's Rep.* 147,) the last day of the period limited by statute, within which a party had a right to appeal, fell upon Sunday. The appeal was brought on Monday. The court held that Sunday had in no case been

excluded in the computation of *statute time*, and dismissed the appeal. The cases showing that Sunday would not be counted as one of the four days within which a party might move in arrest of judgment, were cited to the court. But they were said to be cases in practice, and not interfering with the rule which the courts apply in the computation of time under a statute. The same doctrine is laid down as the general rule in *Alderman v. Phelps* (15 *Mass. Rep.* 285), and in *Thayer v. Felt* (4 *Pick.* 354). Mr. Cowen, in his Treatise, adopts and applies this rule to the case of a justice rendering judgment. (2 *Cowen's Treatise*, 1022.) He says "the four days within which a justice shall render judgment, are to be computed as excluding the first day; and if the fourth day fall on Sunday, *judgment must be rendered the day preceding.*" It is, however, supposed that a different rule has been introduced, where the time is *short of a week*. This rule is found in the case of *Thayer v. Felt* (4 *Mass. Rep.* 354). The case is cited in a note to an anonymous case decided by Ch. J. Nelson, in 2 *Hill*, 375. The principal case came before Judge Nelson on a motion in which it was held that the *two* days within which a jury were to be summoned, and appear before the sheriff, to try a claim of property by virtue of the thirteenth section of the act concerning replevin (2 *R. S.* 432), were *two law days, and that Sunday was to be excluded*. Nothing is said of the rule adopted by the court in Massachusetts of excluding Sunday in all cases where the time was less than a week, and *including* it when the time exceeds that period. We are also referred to the case of *Whipple v. Williams*, decided by Justice Allen in 1849. He held that a notice of adjustment of costs served on the evening of Saturday for nine o'clock on the next Monday morning, at Cooperstown, some 30 or 40 miles from the residence of the attorney, on whom the notice was served, was overreaching and oppressive practice, and within the case of *Smith v. Brown*. (2 *Wend.*, 245.) He also alluded to the case of *Thayer v. Felt*, as showing that the notice was irregular. We think, however, that the case might well be decided on the first ground mentioned by the judge. The Superior Court in the city of New York have held that no such rule as that laid down by Justice Wilde in *Thayer v. Felt*, exists in this State, in the 2d of *Sandford's S. C. Rep.*, 131, where Ch. Justice Oakley gives the opinion of the court. In truth, the adoption of such a rule would

revolutionize the existing practice in many cases. If the rule is adopted, there is no reason why it should not be applied in matters of practice as well as others. But I allude to a familiar case under the former practice, where a notice of argument is required to be a four days' notice. In that case, a notice served on Thursday, for the *succeeding Monday*, was always held good. But on the principle of excluding Sunday, it would be too short. Again: a summons in a justice's court was directed by statute to be returnable not less than six nor more than twelve days from its date, (2 *R. S.* 160, § 14,) and to be served at least six days before the time of appearance mentioned therein. (§ 15.) Now if the summons were issued on a given day, it must be returnable one day later, by including Sunday, where there is only a six days' service. By the act of 1831, p. 403, § 33, a short summons or attachment was substituted in the place of a warrant; and such process was to be made returnable not less than two nor more than four days from the date. Now if the warrant was issued on Monday, it might be made returnable on Friday; but if issued on Friday, it could be made returnable on the next Wednesday, under the new theory of computing time less than a week. So, too, notice of sale on an execution must be posted up at least four days before the sale. (2 *R. S.* 182, § 41. 1 *Cowen*, 421.) It follows that one rule of counting must be adopted if the notice be posted up on Monday, and another to comply with the rule in question, if the notice is posted on Wednesday. Without specifying more instances, it is quite apparent that the adoption of this new rule would introduce the greatest confusion in practice. In point of fact we believe that the universal custom has been to make no distinction where Sunday intervenes and where it does not. Sunday is always counted as one of the days, when the statute has declared that an act shall be performed within a given number of days; whether the number of days specified by the statute is longer or shorter than a week.

We must therefore reverse this judgment.

Judgment reversed.

SUPREME COURT.

JOHNSON V. THE CAYUGA AND SUSQUEHANNA RAILROAD COMPANY.

(11 *Barb.*, 621. *Decided* 1852.)

A railroad company may properly be sued in a justice's court, by long summons.

In cases of corporations, no provision is made by statute for process by warrant, or attachment, or short summons.

* * * * *

APPEAL from a judgment of the Tioga County Court, reversing a justice's judgment in favor of the plaintiff in that court.

Johnson sued the defendant, a railroad company, in a justice's court, in the county of Tioga, by long summons. The defendant appeared by attorney and moved that the suit be dismissed, on the ground that the defendant had not been served with legal process; and alleged that the defendants were a corporation, whose office and chief place of business was in Ithaca, Tompkins county, and not in Tioga county, and that the summons in the suit was not by short summons; which allegations were not denied by the plaintiff; but it was admitted that the defendant's railroad extended into the county of Tioga, and that its business was partly transacted in that county.

* * * * *

John J. Taylor, for the appellant.

J. M. & G. W. Parker, for the respondent

By the Court, SHANKLAND, J. Two questions are discussed in the points submitted; first, could the defendant be sued by long summons? Second, was there any evidence to sustain the verdict of the jury?

On the first question I am of opinion that the defendant was properly sued by long summons. The constitution of 1846 provides that corporations may be sued in like cases as natural persons, before justices; and § 45 of the act amending the judiciary act of 1847, provides the mode of service of process in such cases,

and directs it to be served on the presiding officer, secretary, cashier, treasurer, or any director or trustee thereof. In the absence of statutory regulations to the contrary, the ordinary long summons is the proper and legitimate process of a justice's court. In cases of corporations, no provision is made for process by warrant, or attachment, or short summons. The provisions made by statute for process by warrant, attachment and short summons are for the cases of natural persons sued as defendants, and not corporations. The words "resident" and "non-resident," used in the statute in respect of process by warrant and short summons, seem inappropriate when applied to corporations.

* * * * *

Judgment of County Court affirmed.

SUPREME COURT.

THOMPSON & BOYNTON v. SAYRE.

(1 *Denio*, 175. *Decided* 1845.)

Since the passage of the act exempting non-residents of the State from arrest for debt, (*Stat.* 1840, p. 120, § 1,) a short summons or attachment is the proper process against such non-residents, when sued before a justice of the peace; and any other process would be void. The doubt upon that question in *Dowd v. Stall* (5 *Hill*, 186), resolved.

On the return of a summons or attachment, if the defendant refuses to plead, the justice may, on his own motion or on the application of the plaintiff, adjourn the cause not exceeding eight days. The case of *Fanning v. Troubridge* (5 *Hill*, 428), limited, so as to consist with this rule.

ERROR to the Chemung common pleas. Thompson & Boynton, on the 31st July, 1844, made an application in writing to a justice for an attachment against the goods, &c. of Sayre, which was accordingly issued, returnable the third day of August following. It was served on the first day of August, and the parties appeared on the return day. It was admitted that the defendant was proceeded against by attachment on the ground that he was a resident of the state of Pennsylvania. The defendant objected to the regu-

larity of the attachment, and asked to have it discharged, which motion was denied. The plaintiffs then declared on the common counts and for professional services rendered by them as physicians, and for medicines furnished at the defendant's request. The cause was adjourned, on the plaintiff's motion, to the 6th day of the same month; the defendant not interfering otherwise than to object to further proceedings for want of jurisdiction. On the adjourned day the plaintiffs appeared; the defendant appeared by attorney who objected to the plaintiff's proceedings and then left the room.

* * * * *

The justice rendered a judgment for the plaintiffs for \$15.94, besides costs, which the common pleas reversed on *certiorari*, for errors of the justice "in matters of law," as was stated in the record in that court.

E. P. Brooks, for plaintiffs in error.

Gray & Hathaway, for defendant in error.

By the Court, JEWETT, J. The first question presented in this case is: Can a suit in a justice's court to recover a demand arising upon contract be regularly commenced against a defendant, resident in another state, by attachment?

The revised statutes provide that "no person shall be proceeded against by summons out of the county in which he resides." (2 R. S. 227, § 13.) The 17th section of the same title provides, that the first process against a non-resident of the county should be by warrant. This provision was changed by the act to abolish imprisonment for debt. (*Sess. L.* 1831, 396, § 1, 2.) By that act the process by warrant for the recovery of any debt, &c. against any person, a resident of this state, and against any person who had been such resident, for at least one month previously, was abolished.

The 30th section of that act, (*p.* 403,) provided that no execution, issued upon any judgment rendered by a justice of the peace, &c., upon any demand arising upon any contract, &c. should contain a clause authorizing an arrest or imprisonment of the person against whom issued, unless it should be proved, &c.

1. That the person against whom the same should issue had not resided in this state for the space of thirty days, immediately preceding the commencement of the suit in which such judgment was rendered, &c. ; or 2. That judgment was for money collected by a public officer ; or 3. For official misconduct or neglect of duty ; or 4. For damages for misconduct or neglect in any professional employment.

The 31st section provides that no warrant should issue against any defendant in any case in which an execution on the judgment recovered could not be issued against the body of such defendant. The 32d section provides, that "whenever, by the provisions of the 31st section no warrant can issue, and the plaintiff shall be a non-resident of the county," and shall make the proof, &c. "now required by law to entitle him to a warrant," "the justice shall issue a summons, which may be made returnable not less than two nor more than four days from the date thereof," &c. The 33d section provides, that "whenever by the provisions of the 30th section of this act no warrant can issue, and the defendant shall *reside out of the county*, he shall be proceeded against by *summons* or *attachment*, returnable not less than two nor more than four days from the date thereof, which shall be served at least two days before the time of appearance mentioned therein ; and if such defendant be proceeded against otherwise the justice shall have *no jurisdiction of the cause*." It is seen by this section of the act, that a short summons or attachment was provided for as *the* process by which a suit could be commenced in the case in which a warrant was authorized by the provisions of the revised statutes first referred to, (2 *R. S.* 228, § 17,) i. e. "*when the defendant is a non-resident of the county*." The revised statutes have not in terms provided any process by which a suit could be commenced in a justice's court against a non-resident of this state, except under the description of a *non-resident of the county*, which I cannot doubt includes all persons residing out of the county, whether in this or any other state.

It is undoubtedly true, that under the provisions of the act of 1831, a non-resident of the state could not be proceeded against by summons or attachment, as the act (§§ 30, 31,) provided a warrant as the process by which a suit in a justice's court might be commenced against such persons, and the provision extended to such persons coming into this state who had not resided here for

.

one month. The 33d section did not authorize the process by summons or attachment against any person provided for by the 30th section. Then came the act of 1840, (*Sess. L. 1840, p. 120, § 1,*) which provides that so much of the act of 1831, as declares that the provisions in the first section thereof, shall not extend to any person who shall not have been a resident of this state for at least one month previous to a suit commenced against him, is hereby repealed. That part of the act of 1831, which contained such declaration, was the 30th section. After the passage of the act of 1840, therefore, there remained no process by which a suit could be commenced against a non-resident of this state, unless it is provided for by the 33d section of the act of 1831. By the first section of that act *no person* could be arrested, &c.: this was qualified by the 30th section, which declared that *all persons* not residents of this state, and who had not resided here for one month, might be arrested, &c. The act of 1840, repealed so much of section 30th, as authorized the arrest of a non-resident of this state; that qualification or exception being *stricken out* of the 30th section, there remained no provision authorizing the arrest of *any person* for debt. Then comes the 33d section, which we have seen provided for a *summons or attachment* in all cases where the defendant resides *out of the county*, and against whom by the provisions of the 30th section no *warrant* can issue. The question then arises, what effect, if any, does the act of 1840 have upon the provisions of the 33d section? If the provisions of the 30th section, providing for a warrant against a non-resident of the state being repealed, are to be regarded as though they never existed in the section with reference to this suit, then there is no difficulty in the way in holding that this suit was regularly commenced by attachment under the 33d section. Thus regarding the section, the application presented a case where by the provisions of the 30th section no warrant could issue. The rule which Lord Ch. J. Tindal laid down in *Key v. Goodwin*, (4 *Moo. & Payne*, 341, 351,) and which this court approved in *Butler v. Palmer*, (1 *Hill*, 332,) is this, that a repealing statute has the effect "to obliterate the statute repealed as completely from the records of parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and *concluded* whilst it was an existing law."

I therefore hold, that any person being a non-resident of the county (and a non-resident of the state comes within that description,) *must*, when sued before a justice of the peace, be proceeded against by a short *summons* or *attachment*—and that any other process would be irregular and void. I am aware of the doubt suggested by Justice Bronson in *Dowd v. Stall*, (5 *Hill*, 186,) whether a non-resident of this state could be sued in a justice's court by any process under the statutes as they now stand; but that case did not call for any decision of the question, and it is not pretended to be decided there.

* * * * *

Judgment of the common pleas reversed, and that of the justice affirmed.

SUPREME COURT.

BOWNE & MILLARD *v.* MELLOR.

(6 *Hill*, 496. *Decided* 1844.)

If a suit be commenced before a justice against a non-resident of the county by long attachment, and the plaintiff fail to appear on the return day thereof, the defendant may either treat the process as void, and recover his damages in an action of trespass, or waive the irregularity and take his remedy on the attachment bond.

ERROR to the Delaware common pleas, where Mellor brought an action of debt on an attachment bond executed by Bowne & Millard. The case was this: On the 27th of March, 1841, Bowne applied to a justice of the peace of the county of Delaware, for an attachment against Mellor, on the ground that he was about to depart from the county with intent to defraud his creditors. (2 *R. S.* 230, § 26.) An affidavit was made and the bond in question executed by Bowne, with Millard as his surety, conditioned to pay Mellor all damages and costs which he might sustain by reason of issuing the attachment, if Bowne failed to recover judgment. (§ 29.) The justice issued the attachment, which was made returnable *seven days* afterwards, and the goods of Mellor were attached. Bowne did not appear on the return of the attach-

ment, and nothing further was done in the suit; whereupon Mellor brought this action. The defendants proved that Mellor was a resident of the county of Dutchess, when the attachment issued; and as he was not therefore liable to be sued by a long attachment, they insisted that the bond was void. The court overruled the objection, to which the defendants excepted, and the jury found a verdict for the plaintiff. The same defence was also set up by a special plea, to which the plaintiff demurred, and the court below gave judgment in his favor. The defendants brought error.

S. Gordon, for the plaintiffs in error.

A. J. Parker, for the defendant in error.

By the Court, BRONSON, J. As Mellor was not a resident of the county of Delaware, there should have been a short, instead of a long attachment. He might have treated the process as void and recovered his damages in an action of trespass. But he elected, as I think he had a right to do, to waive the irregularity, and take his remedy on the bond. Having adopted that course, Bowne, who procured the attachment to be issued, was not at liberty to show the irregularity for the purpose of defeating the action.

Judgment affirmed.

SUPREME COURT.

BARKER & KNAPP v. MILLER.

(6 *John.*, 195. *Decided* 1810.)

In an action of trespass, brought by an officer who had seized goods under an execution against a third person, for taking them away, it was held that the possession of the officer, by virtue of the execution, was sufficient to enable him to maintain trespass or trover, and that proof of the seizure, by virtue of the execution, was sufficient, without producing the judgment. *Lockwood v. Bull*, 1 *Cow. Rep.* 322. *Dillenback v. Jerome*, 7 *Cow. Rep.* 297.

In error on *certiorari* from a justice's court.

The return stated that *Miller* sued Barker & Knapp. Barker was personally served with the summons, and Knapp by a *copy*.

Barker appeared, but Knapp did not. Miller declared against both defendants; for that he being a constable, and possessed of certain articles of furniture, to the amount of twenty-five dollars, which he had seized on an execution, against James Caswell, the defendants took and converted them. Barker appeared and pleaded by attorney. Issue was joined before the justice. The plaintiff produced two executions, by virtue of which he had seized the property. This proof was objected to, unless he also produced the judgment, but the proof was admitted. The plaintiff proved that he had seized the property, and left it with Caswell, and that the defendants had taken it away after being forbidden. The justice gave judgment for the plaintiff for four dollars and nineteen cents.

Per Curiam. The plaintiff below brought trespass against strangers, for taking goods out of his possession; and it was sufficient for him to show, as against them, that he had taken the goods into his possession, by process of execution. The possession so acquired was enough to maintain trespass or trover against a third person, for taking them away without right or authority. (*Wilbraham v. Snow*, 2 *Saund.* 47.) After the seizure under the execution, the goods were, in judgment of law, in possession of the constable, as against a wrong-doer; and Caswell, with whom he had left the goods for safe keeping, was no more than his servant. (7 *Term Rep.* 12, *Grose, J.*) Proof of the seizure was enough, without producing the judgment. The rule that the officer must show a judgment does not apply when sued in trespass by a stranger.

This being the only point, or error, stated by the plaintiff in error, the judgment below, which appears to be only against the defendant below who appeared, must be affirmed.

Judgment affirmed.

SUPREME COURT.

AVERY & LATHROP v. SLACK.

(17 Wend., 85. Decided 1837.)

In an action for a penalty for a violation of the *excise law*, an *endorsement* upon the process in these words, "according to the act 'Of the internal police of the State,'" is not a compliance with the statute, requiring that upon process for a recovery of a penalty shall be endorsed a general reference to the statute giving the action. It *seems* that at least the number of the *title*, if not the particular *section* under which the suit is brought should be specified.

A *plea* put in after a decision upon an objection to the sufficiency of an endorsement upon process, is not a waiver of the objection.

ERROR from the Chenango common pleas. Avery & Lathrop, as *overseers of the poor of the town of Sherburne*, commenced a suit by *summons*, in a justice's court, against Slack. There was an endorsement on the summons in these words: "According to the act of the internal police of this state." On the return of the process the parties appeared and the plaintiffs declared, stating in the first count of the declaration, that the defendant was indebted to them in the sum of \$25, according to the provisions (of the revised statutes) chapter 20, title 9, part 1, § 16, and being so indebted, undertook and promised to pay, &c., whereupon an action hath accrued, &c. The second count stated the defendant to be indebted to the plaintiffs in the sum of \$25, 'for a violation of the above statute,' whereby an action hath accrued, &c. The third count stated that the defendant had 'violated the above statute by selling ardent spirits contrary to said statute.' The defendant objected that the *endorsment on the summons was insufficient and improper*. The justice overruled the objection. The defendant thereupon pleaded *nil debet*. The cause was tried and judgment was rendered by the justice against the defendant. The common pleas of Chenango reversed the judgment for the error of the justice in overruling the objection to the sufficiency of the endorsement upon the process. The plaintiffs sued out a writ of error.

J. Benedict & H. Vanderlyn, for plaintiffs in error.

R. Judson, for defendant in error.

By the Court, COWEN, J. The statute upon which the decision of the common pleas proceeded, is thus; "Upon every process issued for the purpose of compelling the appearance of the defendant to any action for the recovery of any penalty or forfeiture, shall be endorsed a general reference to the statute by which such action is given, in the following form; 'according to the provisions of the statute regulating the rate of interest on money,' or 'according to the provisions of the statute concerning sheriffs,' as the case may require, or in some other general terms referring to such statute. 2 R. S. 481, § 7. It is impossible to say, with anything like precision, in what form the endorsement in this case should have been made. In one of the examples given by the act—that of "the statute concerning sheriffs,"—the endorsement would be confined in its reference neither to section, title, article, nor even part nor volume of the statute book; for the provisions concerning sheriffs are probably more multifarious and diversified in their objects than those relating to any other officer or subject. I think, however, we must say, that the object of the statute was to give the defendant notice by endorsement, of the offence for which he is prosecuted. The endorsement in question answers no such object. The statute "of the internal police of the state," 1 R. S. 612 to 717, 1st, ed. and 621 to 712, 2d ed. runs through about 100 pages. It contains twenty-one titles, all relating to objects entirely distinct and disconnected, and several of them imposing a great variety of penalties to be collected by the overseers of the poor. How was it possible, under this endorsement, for the defendant to know the action was for violating the *excise law*, tit. 9, or the statute against *gaming*, tit. 8, art. 3? Both give penalties to the overseers which may be of the same amount. The reference here would have been quite easy to title 9, which would probably have been sufficient, because it relates to the excise and regulates inns and taverns. It would, however, have been still better, had the precise section been named. As the endorsement stood, it was the merest evasion of what the statute requiring it must have intended. To disregard this objection would be to repeal the statute.

But it is said the defendant waived the objection by pleading over. Not so. He made a specific objection in due season, and that being overruled, he was compelled to plead or give up all he

had to say on the merits. Resistance, to the extent of a man's power, is certainly a new kind of waiver.

The court below were clearly right, and the judgment must be affirmed.

SUPREME COURT; AT CIRCUIT.

DAVENPORT v. DOADY.

(3 *Abb.*, 409. *Decided* 1856.)

THIS action was brought by Robert H. F. Davenport against Michael Doady, to recover the brig S. D. Horton, which the defendant by authority of an execution had levied upon and seized. The action was commenced in the Marine Court of the city of New York by Ira S. Elkins, by attachment against "John Doe and Richard Roe, owners of the brig S. D. Horton." After the attachment was served by seizing the vessel, the name of said Davenport was inserted in the process as defendant; and judgment was rendered against him, execution issued, and the brig levied upon. The action was tried before Judge Gould.

The question before the court on the trial, was stated by the counsel for the plaintiff, to be, whether in the Marine Court an attachment could issue against a defendant by a fictitious name. He stated that the Code, § 175, allowed a suit to be brought against a person by a fictitious name, but that section of the Code was applicable only to other and higher courts than the Marine and justices' courts; therefore, the law in relation to fictitious names stood the same as before the passage of the Code — and remained as enacted in the Revised Statutes, which provide that when the name of any defendant shall not be known to the plaintiff, he may be described in the *summons* or *warrant* by a fictitious name: the authority, however, given by the statute to insert a fictitious name, does not apply to suits commenced by attachment. *Cowen's Treatise*, 2d Part, 584. Therefore, no judgment had been

obtained in the action. As an execution can issue only upon a judgment rendered, there was nothing to protect the defendant.

Gilbert Dean, for plaintiff.

Whedon & Davison, for defendant.

Gould, J.—I find that Ira S. Elkins did not on or about February 17th, 1855, recover a judgment in the Marine Court of the city of New York against the plaintiff in this action for any amount whatever.

I further find that the instrument offered by the defendant in this action, purporting to be an execution * * * *

* * * was not an execution, * * * *

and that the same is no protection to the defendant because he had notice that the said paper purporting to be an execution, was issued when there was no judgment against the defendant named in such pretended execution.

SUPREME COURT.

THE COMMISSIONERS OF HIGHWAYS OF THE TOWN OF CORTLANDVILLE *v.* PECK.

(5 *Hill*, 215. *Decided* 1843.)

* * * * *

Suits by commissioners of highways should be brought in their individual names, with the addition of their official title; and if their names be not mentioned, it is ground for non-suit at the trial.

ERROR to the Cortland C. P. The action was brought by "The Commissioners of Highways of the town of Cortlandville," without mentioning their names, on a promissory note in these words: "I promise to pay the commissioners of highways of the town of Cortlandville one hundred dollars and sixty-six cents, with use, one year from date, for value received, February 16th, 1841. The consideration is for borrowed money. (Signed) Nathan Peck."

The declaration contained the money counts only, with a copy of
 the note annexed. * * * * *
 * * * * *

M. T. Reynolds, for the plaintiffs in error.

S. Beardsley, for the defendant in error.

By the Court, NELSON, J. We have already decided that the plaintiffs cannot maintain a suit in their official name or title; but must use their individual names, annexing their official title. (*Supervisor of Galway v. Stimson*, 4 *Hill*, 136.) The plaintiffs were therefore properly non-suited, and the judgment must be affirmed.

* * * * *

SUPERIOR COURT, NEW YORK CITY.

ANONYMOUS.

(8 *Howard*, 134. *Decided* 1852.)

At Chambers. Mr. Justice Campbell was applied to for an order of arrest against a husband and wife in a suit brought for an alleged assault and battery committed by the wife not in the presence of her husband. He held, that the common law rule which exempts a married woman from arrest in all cases whatsoever, was in no wise affected by the Code authorizing the arrest of a female for "a willful injury to person, character, or property." He held also, that under the Code, a husband could not be arrested in an action brought upon a contract made, or tort committed by, the wife. The application was denied.

The other judges concurred in this decision.

SUPREME COURT, FIRST DISTRICT; SPECIAL TERM.

RATHBONE v. MORRIS.

(9 *Abbott*, 213. *Decided* 1859.)

MOTION for an order to supersede an execution.

INGRAHAM, J. The defendant has given the necessary security on appeal, and has obtained an order allowing the sureties after justification. He now moves for an order superseding the execution issued before he appealed, and under which a levy had been made.

Section 339 of the Code, which prescribes the effect of security on appeal, gives it no other virtue than to stay further proceedings on the judgment; it discharges or vacates nothing, but merely stops the plaintiff where he was at the time of giving the security, leaving him in possession of any rights or security previously obtained. It gives the court no authority to vacate any proceeding, or release any right previously acquired.

The same practice prevailed under the old system (*Blanchard agt. Myers*, 9 *Johns.*, 66; *Kinney agt. Whitford*, 17 *Ib.*, 34), and it was only where the execution was issued within the four days, or while the rule for judgment was being perfected, that the court could interfere, if the bail were subsequently put in. (*Jackson agt. Schaubert*, 7 *Cow.*, 417.) The revised statutes directed a stay, if the execution were not fully executed; and the court refused to order the sheriff to proceed after bail was put in, but they did not vacate the levy. (*Delafield agt. Sandford*, 3 *Hill*, 473.)

The decision of the general term of this district, in the matter of *Berry*, (26 *Barb.*, 55,) settles the question in this court. It is there held that the security and appeal only stays further proceedings. They do not undo anything already done. They only stay an execution if it have not issued, so that if the execution were issued, and a levy made, the sale was stayed, but the levy was not interfered with. The rule as laid down in these cases may be a hard one to a debtor who has given ample security, but I have no authority to change it.

Motion denied.

COURT OF APPEALS.

BENNETT *et al.* v. BROWN.(4 *N. Y. Reports*, 254. *Decided* 1850.)*J. A. Hathaway*, for appellant.*A. B. James*, for respondent.

GARDINER, J. delivered the opinion of the court.

The question presented by the pleadings is, whether security by bond is authorized and required, in order to procure an attachment, under the 33d section of the act to abolish imprisonment for debt. (2 *R. S. 2d ed.* 202, § 292.) That section provides that "Whenever by the provisions of the 30th section of this act, no warrant can issue and the defendant shall reside out of the county, he shall be proceeded against by summons, or *attachment*, returnable not less than two, or more than four days from the date thereof, &c., and if such defendant be proceeded against otherwise, the justice shall have no jurisdiction of the cause." The authority granted by this section, was in addition to powers conferred upon the magistrate in cases of [255] attachment, by the 26th section of the revised statutes, in all of which the application for the process was required to be made in writing, with an affidavit stating the amount due, and the grounds of the application; and the facts and circumstances to establish such grounds, were to be verified by the affidavit of two witnesses. (2 *R. S. 2d ed.* 160, § 26 to 28.) By the 29th section, a bond with sufficient surety, to be approved by the justice, was also to be executed, with a prescribed condition.

By the 43d section of the act to abolish imprisonment for debt, (2 *R. S. 2d ed.* 203, § 301,) "all the provisions of title fourth, (which include the sections from the revised statutes above mentioned,) not hereby expressly repealed, and not inconsistent with the provisions of this act, are hereby declared to be in full force, and to apply to the provisions of this act, so far as the same relate to proceedings in courts before justices of the peace." In addition to this general provision, the 35th section of the same act declares, that the plaintiff, or some one in his behalf, shall also execute in the

"cases provided for by this act, a bond in the penalty of at least one hundred dollars, with such sureties and upon such condition as is required in section 29 of said article."

The bond, therefore, required by the 29th section of the revised statutes, is not only recognized by the general provisions of the 43d section of the act to abolish imprisonment for debt, but is expressly adopted by the 35th section above mentioned. Such a bond was executed by the defendant to the plaintiff upon obtaining the attachment against the latter, in the suit stated in the pleadings. I think the justice was right in exacting it, and that it is a valid security in the hands of the plaintiff.

In *Clark v. Luce*, (15 *Wend.*, 480,) it was held that no affidavit was necessary to authorize an attachment under the 33d section above mentioned. I fully agree with the learned judge in *Taylor v. Heath*, (4 *Denio*, 592,) that the decision in *Clark v. Luce*, is in conflict with the express provisions of the 43d section of the act to abolish imprisonment, and if sustained, would be a radical repeal of this [256] section: as that decision has been successfully impeached in the court in which it was pronounced, it cannot be considered as authority here.

The judgment of the supreme court should be reversed, and judgment for the plaintiff on the demurrer.

Judgment reversed, and judgment for plaintiffs on demurrer.

SUPREME COURT.

BENNETT *et al.* v. BROWN.

(31 *Barb.*, 158. *Decided* 1857.)

Where the condition of an attachment bond given to a justice of the peace is that if the plaintiff fails to recover judgment, the obligors will pay all damages which the defendant in the action may sustain by reason of the issuance of said attachment; *held*, that if the plaintiff recovers a judgment which is afterwards reversed, the costs of reversal should be included as part of the damages of the defendant in the suit.

W. C. Brown, appellant, in person.

J. A. Hathaway, for the plaintiffs.

By the Court, PRATT, J. This action was brought, under the old practice, upon a bond given by the defendant to the plaintiffs, upon an application made by one Smead for an attachment against the property of the plaintiffs, before a justice in St. Lawrence county. Smead recovered judgment before the justice, against the plaintiffs, which was afterwards reversed by the common pleas of St. Lawrence county. On the same day of issuing the attachment another attachment was issued by the same justice, in favor of one Miller, upon which judgment was rendered against the Bennetts. The property taken was sold by a constable who held both executions, and a portion of it applied to the execution in favor of Miller. The only plea upon which the action was tried was *non est factum*. Two questions arise in this case: 1. Was it proper to receive evidence of the application of a portion of the proceeds of the sale of the property upon the Miller execution, under the plea of *non est factum*, in mitigation of damages? and 2d. Were the plaintiffs entitled to costs in the common pleas, as part of the damages?

The plaintiffs in this case were entitled to judgment in form for \$100, the amount of the penalty; but as that point was not taken by the counsel, either on the trial or upon the argument of the appeal, I shall only examine the above points.

The counsel for the plaintiff has gone into a very elaborate argument to show, that under the old system of pleading, the plea of *non est factum*, to an action upon a sealed instrument, only put in issue the execution of the instrument, and admitted all the other allegations of the declaration. This was scarcely necessary, as no one has denied the principle. A breach of covenant or of the condition of a bond may be admitted, and yet as a general thing the plaintiff will be put to proof of the extent of the damages. There are undoubtedly cases where no proof would be necessary, where the law would declare the damages; but, as a general rule, such proof is necessary. Now in all such cases the plea of *non est factum* does not admit the amount of damages, and it is competent for the defendant to prove that the actual damages are less than the plaintiff's claim.

But there is another principle, equally well settled under the old system of pleadings, and that is, that the plea must be a full answer to the count which it professes to answer; and if the facts

are proper in mitigation and yet do not constitute a full answer, they must be given in evidence under the plea of *non est factum*. (2 *Hill*, 194. 23 *Wend.*, 293. 21 *id.* 277.) In an action upon a bond for the performance of covenants, it was necessary for the plaintiff to assign breaches. If a defendant had a full defense to a breach he was bound to plead it, the same as he would plead to a count, or he would be deemed to admit the breach. In this case, if the whole property had been applied upon the Miller execution it would have constituted a good defense to the assignment of the breach that Smead had not returned the property, and by neglecting to plead it he would probably have been precluded from showing the same facts in mitigation of damages.

The fact is, there is no assignment of breaches, in this case, but simply a general assignment that the defendant did not pay the damages and costs. The property was only partially applied to the Miller execution. It could not therefore be pleaded as a bar to the action, or as a full defense to any breach that was or could be assigned. There was no method, therefore, by which the defendant could avail himself of this partial defense, except to give it in evidence in mitigation of damages. If he had attempted to plead it, his plea would have been held bad on demurrer. The referee was therefore clearly right in allowing it to be proved in mitigation.

Upon the next question above stated, it seems to me that it is virtually decided in the ruling of the referee that the condition of the bond is not performed by the recovery of the judgment before the justice. If the reversal of the judgment in the common pleas may be deemed, within the meaning of the condition of the bond, to constitute a failure to recover judgment on the part of the obligor, it would seem to follow that any costs which the obligee might incur in any stage of the litigation up to the time of such reversal, were within not only the meaning but the words of the condition.

The condition was that the obligor should pay all damages and costs which the obligee might sustain by reason of the issuing of the attachment if the applicant failed to obtain judgment thereon. The referee has decided, and the correctness of this decision cannot be questioned under the decision of this court in *Ball v. Gardner*, (21 *Wend.*, 270,) that the adjudication of the justice did not finally

determine the question whether Smead failed to recover or not, but that it was finally determined only by the judgment of the court of common pleas. If this be so, I am utterly unable to perceive why the costs necessarily incurred in arriving at this final determination do not come within the words of the bond — why the common pleas costs can be excluded more properly than the costs in the justice's court. The question does not involve the consideration of the point whether the *certiorari* in the common pleas is technically the same suit as the one before the justice; for the condition of the bond does not restrict the obligors to the damages and costs incurred in the same suit, but it is general, embracing in general terms all damages and costs incurred by reason of the attachment. It therefore does not come within the case of *Fenno v. Dickinson* (4 Denio, 84). That was a bond given by a non-resident plaintiff, and the condition was in that case to pay any sum that might be adjudged against him *in that suit*. The court held that a *certiorari* in the court of common pleas was not the same suit, and placed their decision upon that ground alone. In this case there is no such technical difficulty in the way of doing substantial justice between these parties.

Judgment reversed, and new trial granted.

COURT OF APPEALS.

BENNETT *et al.* v. BROWN.

(20 *N. Y. Reports*, 99. *Decided* 1859.)

APPEAL from the Supreme Court.

Francis Kernan, for the appellant.

J. A. Hathaway, for the respondents.

SELDEN, J.: * * * * * * * * *
 * * * * * * * * *

The defendant contends that when the plaintiff in the attachment recovered a judgment before the justice, the bond was at an

end, whether that judgment was legal or illegal, or whether it remained in force or was abrogated or reversed. This I apprehend is putting far too liberal a construction upon the words of the bond. It is true the defendant is a surety, and is therefore entitled to the favorable consideration of the court, but this cannot entitle him to a construction which in this case would defeat the whole object of the bond. That was intended to afford an indemnity to the plaintiffs against the consequence of the attachment, if wrongfully obtained. By the defendant's construction, if the wrong in obtaining the attachment is followed up by a wrong decision of the justice, then the party injured has no remedy upon his bond, although he is put to the additional expense of a *certiorari* to get rid of the judgment.

I do not believe this is the true meaning of the condition. The statute could never have intended to make the indemnity of the party, proceeded against in his absence, dependent upon the accuracy of the justice. This question was decided in accordance with these views, by the supreme court in the case of *Ball v. Gardner*, (21 *Wend.*, 270,) and I see no reason to doubt the correctness of that decision.

A further question arises as to the liability of the defendant for the costs of the *certiorari*, as a part of the damages to be recovered. This question admits, I think, of less doubt than that just considered. The undertaking of the defendant was to pay all damages and costs, which the plaintiff should sustain "by reason of the issuing of the attachment." The costs of the *certiorari* were not only within the fair import of the condition, but strictly within the terms used. These costs were clearly caused by the issuing of the attachment. There is nothing in the language of the condition limiting the damages to such as should arise in the suit commenced by the attachment.

The judgment should be affirmed.

NEW YORK COMMON PLEAS.

BALL v. MANDER.

(19 *How.*, 468. *Decided* 1860.)*General Term, September, 1860.*

By the Court, HILTON, Judge. * * * *

* * * * * * * *

Respecting the questions presented in the notice of appeal as to the jurisdiction of the justice, and the sufficiency of the summons, it is only necessary to remark that § 4 of the district court act permits an action to be brought before any justice where the plaintiff, as was the case here, resides out of the city of New York (*see also* § 80 of *same act*), and by § 13, the summons in actions where the plaintiff is such non-resident, must be served not less than two days before the time for appearance mentioned in it.

The return shows that the summons was served on the 14th of April, returnable on the 16th, and the law does not regard fractions of a day in computing the time for the service of process, notices or pleadings in a cause. (*Columbia Turnpike Road agt. Haywood*, 10 *Wend.*, 422.)

Judgment affirmed.

SUPREME COURT.

BOYCE AND OTHERS v. THOMPSON AND OTHERS.

(20 *John.*, 274. *Decided* 1822.)

Where the titles of several causes, in which the names are different, are included in the same affidavit, or notice, the clerk, on entering the defaults, is entitled to his fees in each cause. (*a*)

An affidavit must be made in each cause upon which to enter a default.

NOTICE of the rule to plead, in this and five other causes, in which the names of the parties were different, directed to each of

(*a*) *Vid. Law v. Jackson*, 2 *Wendell's Rep.* 209. 13 *Johns. Cas.* 310. *Gelston v. Hoyt*, 13 *Johns. Rep.* 590. *Jackson v. Clark*, 4 *Cow. Rep.* 532. *Jackson v. Gainsey*, 3 *id.* 385.

the defendants respectively, and an affidavit of the service entitled in all the causes, was filed, and a default thereupon entered in each cause, by the clerk. A question arose, which was submitted to the court, whether the clerk was entitled to charge fees for six affidavits, or for one only.

Per Curiam. The clerk is entitled to charge for reading and filing an affidavit in each cause. The parties here are different. In *Jackson, ex dem. Burnett v. Keller*, all the causes were at the suit of the same lessor of the plaintiff. Besides, the clerk, in this case, must enter a default, founded on an affidavit, in each cause.

SUPREME COURT.

THE PEOPLE v. HUBBARD.

(24 *Wend.*, 368. *Decided* 1840.)

Where a sheriff, finding the outer door of a house shut, opened it to make a levy, under an execution against the tenant's property—*held*: resistance to him is lawful.

The distinction made in the charge of the court at the sessions, to the jury, that although the sheriff had no right to enter the defendant's house as he did, if, after entering, he made a levy, that levy would be valid for his protection, *not sustained*.

C. P. Kirkland & J. C. Baker (district attorney), for the people.

C. Tracy, for the defendant.

By the Court, COWEN, J. It is not at all surprising that the general sessions gave the direction to the jury which was given in this case. The surprise would have been at a direction the other way; for the English books of practice abound with the distinction, that though the sheriff having a *fi. fa.* be a trespasser in breaking the outer door of the debtor's house, yet when he is once in the house, though he enter illegally, and for the purpose of taking the debtor's goods, and though he would be liable to an action of trespass for the entry, yet the levy is lawful. It follows, if that be the

law, that though he may be resisted in his entry, and even put out of doors by force, yet if he can seize goods, and escape out of doors with them, it then becomes unlawful for the debtor or his assistants to molest him on account of the goods. There is a *dictum* to this effect which has come down to us from the *Year Book*, 18 *E.* 4, *fol.* 4, *pl.* 19, which seems to be the sole foundation of the rule. The case in which it occurs, is thus reported: "Catesby came to the bar, and showed how a *feri facias* was directed to the sheriff of Middlesex, to cause execution to be made for one J. upon a recovery by the said J. against one B.; and afterwards the said B. put all his goods into a chest, closed and locked; and afterwards the sheriff broke the [outer] door of the house and entered into the house and took the goods [away] with him, &c. And whether the sheriff had done any wrong, &c.? *Littleton* and all his companions held that the party might have a writ of trespass against the sheriff for the breaking of the house, notwithstanding the *feri facias*; for the *feri facias* shall not excuse him of the breaking of the house, *but of the taking of the goods only.*" Afterward, in *Semayne's case*, 5 *Rep.* 93, the court speaking of 18 *E.* 4, say, "By *Littleton* and all his companions it was resolved, that the sheriff cannot break the defendant's house by force of a *feri facias*, but he is a trespasser by the breaking; and yet the execution he then doth in the house is good." In *Lee v. Gansel*, *Cowp.* 1, 6, Lord Mansfield speaks of 18 *E.* 4, as being of an action brought for breaking the outer door, in which the court held the action would lie; but at the same time held that an action would not lie for taking the goods. He adds: "I quote this case not to imply that I should perhaps have been of the same opinion myself in a case of the first impression; but to show that the rule of privilege is taken most rigidly." Much of the reason of Lord Mansfield, in the course of his opinion, goes to countenance the distinction in the *Year Book*.

Upon such authority, it is not surprising that the distinction should be followed in the books concerning the duties of sheriffs; and yet I cannot find that the point has ever been adjudged till very lately either one way or the other. Upon the question coming before the supreme court of Massachusetts, in an action against the sheriff for breaking an outer door in the execution of an attachment, it received, as it deserved, much consideration; but the sheriff was

finally held liable both for the breaking of the house and the value of the goods taken. Nearly all the cases bearing upon the point seem to have been cited by counsel, and a learned and elaborate opinion in favor of the plaintiff's entire claim was delivered by Ch. J. Shaw. That opinion was concurred in by the whole court. *Ilisley v. Nichols*, 12 *Pick.* 270. The learned Chief Justice thought it material, as it certainly was, to ascertain whether the point had ever been adjudged, and he concludes that it had not. There is no pretence for saying that it was involved either in *Semayne's case*, or in *Lee v. Gansel*. The 18 *E.* 4, seems to have been spoken of however in both, somewhat ambiguously, not to say as directly involving the question; and it would be arrogant to deny that Coke and Mansfield understood the force of cases in the year books much better than any one at this day. I have examined the case, and given nearly a literal translation of it. It is quite obvious that the main stress of the controversy was whether an action would lie for the breaking and entry. Lord Mansfield himself, as we have seen considers the action as one for breaking the outer door. To this particular action the court say: "The *feri facias* shall not excuse him of the breaking of the house; but of the taking of the goods only." The latter clause contains every word of what the court are represented in the book to have said concerning the taking of the goods. Chief Justice Shaw says: "On a reference to the case in the *Year Book*, 18 *E.* 4, fol. 4, which is usually cited as the foundation of the supposed rule, we think it is quite manifest that the real point decided there was, that a sheriff is not justified in breaking a dwelling house in order to execute a *feri facias*, for a *feri facias* will not excuse an officer for breaking a dwelling house." Of course he is clear that the cases in Coke and Cowper did not turn upon the rule in question. The language of the late Ch. J. Parsons to the same effect with the *Year Book*, in *Widgery v. Haskell*, 5 *Mass. R.* 155, is also mentioned by Chief Justice Shaw as a *dictum* not based upon serious reflection. Finding himself thus entirely unembarrassed by any direct adjudication, he enters into a course of examination in the region of principle, analogy and the decisions in like cases through which an attempt to follow him would be supererogatory. I have adverted to the only authorities which can be relied on as controlling, merely with a view to satisfy myself of their force as positive evidence of the

common law. They all go back to the Year Book, in which it is at least very difficult to see that the point arose. All that was said upon it there rather appears to have been a hasty suggestion upon a collateral matter. Lord Mansfield is unwilling to admit that he should have so decided; and the report of Lord Coke is a mere recital of the case. I think Ch. J. Shaw has satisfactorily shown that here is but a union of mighty names in the extrajudicial assertion of a doctrine which can stand the test neither of principle nor authority. Admitting the distinction to have been directly adjudged in the Year Book and since acquiesced in, there is so much in conflict with it, that we might overrule it without a violation of duty. How would the book then stand upon its face? It admitted what is held by all the other cases, and is undoubted law, that the sheriff had been guilty of a criminal wrong; but asserted that thereby he had acquired a right. It conceded the privilege of protection to the goods, and to the man and his family, yet offered a reward for the violation of that privilege. It legalized resistance against the sheriff's entry even to the shedding of blood; but invited the combat by offering him the spoils within. The law has always proclaimed by a pompous figure that a man's dwelling house is his castle; and promised to defend it as inviolable. The Year Book began in that spirit; but immediately raised a countervailing influence which broke down its own defences. Lord Mansfield declared in *Lee v. Gansel*, that the privilege was founded in a sound maxim of policy. But it is, he says, a maxim of political justice, and makes no part of the privilege of the debtor himself, and he then cites the Year Book, to show that it is annexed to the door. In other words, this sound maxim is very little, if anything, more than a legal abstraction. On reading his whole opinion, it will be found that he was dissatisfied with the privilege itself; but finding it well settled, he construes it in the light of the Year Book, so very strictly as to leave it no more than a shadow. In short, if the privilege itself exists, the clause upon which he relied cannot be law. It is idle and absurd to talk of the privilege, unless it be enforced by adequate sanctions.

It is well known that Lord Mansfield was no friend to that sort of privilege which obstructed the collection of debts. In this he was doubtless right. But he was more legitimately employed as a

legislator in the house of lords, where he advocated the bill for curtailing it, than in narrowing it as a judge. Perhaps the privilege now in question should be repealed by the legislature; but we have no power to repeal it judicially, as I am sure we should virtually do by following the distinction allowed by the court below. We are of opinion that they erred in this respect.

Several other exceptions were taken upon which we felt no doubt, and we should have affirmed the proceeding at once on the close of the argument, had it not been for the question of privilege.

The proceedings are remitted, with directions that the court below proceed to a new trial.

SUPREME COURT.

FANNING v. TROWBRIDGE.

(5 *Hill*, 428. *Decided* 1843.)

A justice has no right to allow an appearance by attorney upon information received *out of court* as to the attorney's authority. *Per* Bronson, J.

Accordingly, a justice having acted upon the oath of the plaintiff's attorney, taken in the absence of the defendant and before the hour at which he was summoned to appear; *held*, erroneous.

Quere, whether an authority to appear for another in a justice's court can be delegated by the attorney, unless the power of delegation be expressly conferred. *See note (a).*

Where, on the return of a summons in a justice's court, both parties appear, but the defendant refuses to join issue, no adjournment can take place without his consent.

Though, after a regular adjournment granted by a justice at the plaintiff's request, the defendant appear at the adjourned day and answer to his name, but decline to take any part in the further proceedings, this will not amount to a waiver of the irregularity.

Otherwise, however, if the defendant participate in the further proceedings by pleading in the cause, asking an adjournment, &c. *Per* Bronson, J.

(a) *Quære*, however, whether the attorney's authority can be delegated unless the power of delegation be expressly given. As to the general rule on this subject, see *Com. Dig. tit. "Attorney" (C 3)*; *Story on Agency*, 14, and the cases there cited; 2 *Kent's Comm.* 632; *Commercial Bank of Lake Erie v Norton*, 1 *Hill*, 501, 505, 506.

ERROR to the Albany C. P. Trowbridge sued Fanning before a justice of the peace by summons returnable June 12th, 1840, at 10 A. M. One Gould appeared for the plaintiff and declared on an account. The defendant appeared in person, but refused to plead, and objected to the appearance of Gould. Gould was thereupon sworn, and testified that E. Worcester had that morning requested him to appear for the plaintiff and get the cause adjourned; Worcester saying that he had been employed by the plaintiff to attend, but was obliged to leave. From the justice's return to the *certiorari*, it appeared that Worcester called on him (the justice) that morning, before the hour mentioned in the summons, and was sworn as to his (Worcester's) authority to appear, and testified that he had been employed by the plaintiff as his attorney, and that being obliged to go to another place, he (Worcester) had employed Gould to appear for the plaintiff and get the suit adjourned. The justice informed the defendant of these facts, after Gould had been sworn as above mentioned; adding, that he (the justice) was satisfied Gould was duly authorized to appear for the plaintiff. The justice then asked the defendant if he wished to plead, and he declined. The cause was thereupon adjourned to the 19th of June, when the plaintiff appeared in person and stated that Worcester, who was present, was his attorney in the suit. The defendant "was also present and answered in the suit, and the court again enquired of the defendant if he wished to plead in the suit, which he declined." The cause was then delayed a short time, "when it was again called and the parties answered. The plaintiff declared himself ready for trial. The defendant being also present stated that he should not appear nor plead in the suit." The plaintiff then went on *ex parte* with his proofs, and the justice rendered judgment in his favor, which the C. P. affirmed on *certiorari*. The defendant thereupon sued out a writ of error.

A. Fanning, in person.

J. C. Yates, for the defendant in error.

By the Court, BRONSON, J. The authority to appear by attorney in justices' courts, when not admitted by the opposite party, must in all cases be proved, either by the attorney himself or by other

competent testimony. (2 *R. S.* 233, § 45.) If an attorney may delegate his authority, there was no proof on the return day of the summons that Worcester had himself been employed. (a) The examination of Worcester on oath before the hour had arrived or the defendant had appeared, was extra-judicial, and in judgment of law proved nothing. A justice cannot act upon information which he has received out of court in relation to the appointment of an attorney, even though the information come from the party for whom the attorney appears. (*Beaver v. Van Every*, 2 *Cowen*, 429.) The defendant took the objection that Gould had no right to appear for the plaintiff and it was never waived. The justice told the defendant what had been done out of court, and added, he was satisfied that Gould was duly authorized to appear for the plaintiff. This amounted to a decision of the question and it was not necessary for the defendant to repeat his objection after it had been overruled. It is evident, however, that he did persist in it; for on being again asked if he wished to plead, he declined, as he had at the first. The adjournment, which seems to have been granted on Gould's motion, was without authority. And besides, if both parties did appear, issue should have been joined before granting an adjournment. (2 *R. S.* 233, § 47.) The adjournment was irregular, and the cause was out of court. (*Kimball v. Mack*, 10 *Wend.* 497.)

The irregularity would have been waived, if the defendant had appeared at the adjourned day and gone to trial. (*Tift v. Culver*, 3 *Hill*, 180.) But although he was present and answered to his name when called, he again declined to plead, and told the justice that "he should not appear nor plead in the suit;" and he took no part in what followed. There can be no waiver of such an irregularity, unless the party afterwards pleads, asks an adjournment, cross-examines the plaintiff's witnesses (7 *John.* 381), or in some other way litigates the cause, merely being present to watch the progress of an irregular proceeding, or saying "here" when his named is called, is not enough.

Judgment reversed.

SUPREME COURT.

FROST v. THOMAS.

(24 *Wend.*, 418. *Decided* 1840.)

THIS suit was brought in the Montgomery common pleas for an assault and battery, and false imprisonment. The defendant, a special deputy, arrested the plaintiff by virtue of a criminal warrant; he refused on the request of the plaintiff to show his warrant; the plaintiff then resisted—whereupon the defendant assaulted and beat the plaintiff. The charge of the court was, that if the defendant did not show, on the request of the plaintiff, the warrant, he was a trespasser. Verdict for the plaintiff, and the defendant sued out a writ of error.

N. Hill, Jun., for the plaintiff in error, insisted that a special deputy authorized to execute a criminal warrant, is not a trespasser for refusing to show his warrant at the time of the arrest. He cited *Arnold & Steves v. Frost*, 10 *Wendell*, 514; 1 *Russell on Cr.* 513, *n. e.* and 516; 1 *Hale's Pleas of the Crown*, 459; *Roscoe's Cr. Ev.* 626; *Cro. Jac.* 485; 9 *Co.* 69; 6 *Id.* 54; 2 *Hawk., B.* 2, *ch.* 13, § 28; 1 *Chitty's Cr. L.* 50, 51.

J. A. Spencer, contra.

The court *held* that a special deputy is bound to show his authority if requested to do so, and if he omit, the party against whom the warrant is may resist an arrest, and the warrant under such circumstances is no protection against an action for an assault, battery and false imprisonment. See *The People v. Hubbard*, *ante*. Judgment affirmed.

SUPERIOR COURT.

JOHN KAMENA v. WANNER & THOMPSON.

(6 *Duer*, 698. *Decided* 1858.)*John S. Jenness*, for plaintiff & respondent.*James M. Sheehan*, for Wanner, appellant.

By the Court, PIERREPONT, J. This is an appeal from an order of the Special Term overruling a demurrer. The plaintiff sues Thompson, a constable, and one Wanner, who was plaintiff in an attachment against Waltje Kamena; and alleges in the second count of his complaint, that the constable having levied upon the plaintiff's property by virtue of an attachment, that he, the plaintiff, as claimant of the property, tendered a bond in conformity with the statute, and the said constable refused to deliver to him the property, but sold the same, and that Wanner instigated the constable to these acts; that the bond tendered was in the penal sum of \$1000, and that the property so seized and required to be delivered on the tender of the bond was of the value of \$2800. The complaint prays judgment in the sum of \$3300.

The defendant Wanner demurs to this count.

The bond required by the 31st section of Part III, Title 4 of the Revised Statutes, requires that the bond shall be "in a penalty double the value of the property attached." Section 34 shows clearly that the statute contemplates protection to the real owner of the property, as well as to the plaintiff, in the attachment. A case which may often happen will illustrate the importance of this provision of the law.

The defendant in the attachment is tenant of the furnished house of A, the furniture is seized by the constable on an attachment against the tenant to satisfy a claim of \$400; the constable not knowing how the furniture will sell, and quite ignorant of its value, seizes the whole, which proves to be worth \$5000. A stranger claims the furniture, gives a bond approved in the sum of \$800, and takes the property. The real owner learning that his property

has been thus taken, goes to the constable to replevy it, and finds in its stead a bond of \$800, and that the furniture has gone no one knows whither. But if the construction for which the plaintiff contends be the true one, the constable could not refuse making the delivery to such claimant, although he had, meanwhile, learned that the property attached was worth ten times the penalty of the bond. (§ 31 and 32.) Taking the construction of the statute, which we are disposed to give it, this count of the complaint, divested of all verbiage and circumlocution, may be fairly stated thus:

The plaintiff complains that the defendant Thompson, being a constable, seized by virtue of an attachment, (against Waltje Kamena,) property of the plaintiff of the value of \$2800; the plaintiff claimed the same and tendered to the said constable a bond duly executed and approved in the sum of \$1000, according to the statute, which requires that the said bond should be in the sum of \$5600; that said constable refused to deliver the property on such tender of the approved bond, and that the defendant Wanner advised and instigated the constable to said acts; wherefore, the plaintiff demands judgment against the said defendants for the sum of \$2800, the value of the property, and \$500 damages, besides interests and costs.

We think such a complaint does not state facts sufficient to make the constable liable; and it follows that Wanner could not be liable for advising the constable to act according to law.

The demurrer must be sustained, and the order of the Special Term reversed with costs.

SUPREME COURT.

COYLES v. HUSTIN.

(10 *John.*, 84. *Decided* 1813.)

The *sheriff* being, *ex officio*, a conservator of the peace, it is his duty to arrest all persons with their abettors who oppose the execution of legal process. Where a sheriff having a warrant to apprehend several persons who had riotously assembled together, and committed an assault, &c. came to the house where they were assembled, and being resisted and unable to make the arrest, commanded A. and others to guard the house in which the persons were assembled, and prevent their escape, while he went to the next town, about four miles distant, to get a sufficient force to enable him to execute the warrant; it was held that A. and the others were bound to aid and assist the sheriff on his order or summons, in preserving the peace, or apprehending the offenders; and that the sheriff was to be deemed *constructively* present, so as to justify A. and the others to arrest the offenders, during his temporary absence, for the purpose of getting further assistance, of which fact the jury were to decide; and that if A. and others so ordered by the sheriff to assist him during his temporary absence for such purpose, should permit or assist the offenders to escape, they would be liable to punishment.

THIS was an action of assault and battery and false imprisonment. The defendant pleaded the general issue; but, by the consent of the attorney of the plaintiff, was to be at liberty to give any special matter in evidence, at the trial.

The cause was tried at the *Orange circuit*, before Mr. Justice Spencer.

The defendant was sheriff of the county of Orange, and had a warrant from a justice of the peace to apprehend five persons, on a charge of having, in a riotous and tumultuous manner, assembled together, and of having committed an assault and battery on Thomas Edsall, &c.

A witness for the plaintiff testified, that the defendant called on the witness to assist him in apprehending certain persons, against whom he had a warrant, and who were said to have taken refuge in the house of the plaintiff, near the outlet of the Drowned Lands, and who were determined to resist, by force, the execution of the warrant. When the sheriff and witness arrived at the plaintiff's house, it was found that the men against whom the warrant was issued had effected their escape. Some persons, who were then

present, charged the plaintiff with having assisted the men in making their escape, and after some conversation between the plaintiff and defendant, the defendant told the plaintiff he must go with him to Goshen before a magistrate; and the plaintiff got his horse, and went with the defendant to Goshen, which is about four miles from the outlet, and arrived there late in the evening.

The plaintiff having rested his cause, the defendant called the magistrate, who issued the warrant, as a witness. He proved the issuing of the warrant, &c. and stated, that on the evening of the same day, the defendant brought the plaintiff to the witness, and charged the plaintiff with having refused to aid him in apprehending the men named in the warrant, and with having assisted them in making their escape, and the witness bound over the plaintiff to answer to the charge, at the next court of general sessions of the peace.

Another witness for the defendant testified, that he was present at the plaintiff's house when the defendant came with the warrant, and read over the names of the men against whom it was issued, and asked the plaintiff if they were there, and the plaintiff said he believed some of them were there. A number of men were collected in a room above stairs, making a great noise, and threatened to sacrifice any person who should come up. The defendant requested the plaintiff to go up stairs, and persuade the men, named in the warrant, to deliver themselves up. The plaintiff said he would not go up for a thousand dollars. The defendant then requested the plaintiff to go to the foot of the stairs, and speak to the men; but the plaintiff refused to do so, and said that the defendant might do his duty, for he had nothing to do with the men, and would not interfere.

It appeared that the plaintiff was superintendent of the works at the outlet of the Drowned Lands, and that the persons against whom the warrant was issued were laborers, employed by him, and that he had been paying and discharging them. The defendant asked the plaintiff to give him the names of the persons collected in the room up stairs; but the plaintiff made no answer. The defendant then said he was determined to take the men on the warrant, and for that purpose would return to Goshen and bring with him a greater force. The defendant then commanded the plaintiff, the witness and two others to guard the house, during his

absence, and prevent the escape of the men. The defendant placed them at different posts around the house ; but the witness did not recollect that any station was assigned to the plaintiff. During the absence of the defendant in the dusk of the evening, the witness hearing a great noise, left his post, and found the plaintiff engaged with one of the other persons placed as guard, in a violent quarrel. During this dispute, which drew the other guard also from his post, the men who were up stairs made their escape from the other side of the house. Three of the persons left by the sheriff as a guard, but not the plaintiff, pursued them, but without success. When the sheriff returned, and found that the men had escaped, the conversation, as before stated, took place between him and the plaintiff and he took the plaintiff to Goshen.

The judge stated to the jury, that the mere refusal of the plaintiff to aid the sheriff, would not justify the latter in arresting him without a warrant, even for the purpose of taking him before a magistrate. That the sheriff could not delegate to the persons left at the plaintiff's house the power of arresting, during his absence, the men against whom the warrant had been issued. The plaintiff, therefore, so far from being bound to prevent the men from escaping, would have rendered himself liable to an action if he had attempted to stop them. That, in his opinion, the plaintiff was clearly entitled to recover, but he did not think it a case for exemplary damages ; that there was no ground to impute malice to the defendant, but, on the contrary, his conduct evidently proceeded from an error of judgment alone. But the plaintiff having sustained an injury, was entitled to compensation ; and the question of damages was exclusively for the consideration of the jury. The jury found a verdict for the plaintiff, for fifty-one dollars.

A motion was made to set aside the verdict, for the misdirection of the judge, and against law and evidence.

Bristed & J. Duer, for the defendant.

Fisk, contra.

KENT, Ch. J., delivered the opinion of the court . The question of justification turned upon this fact, whether the plaintiff, contrary to his duty, aided or assisted the rioters in their resistance

to the execution of the warrant, or in their escape. There were several, and some of them strong circumstances, from which the jury might have inferred that fact against him; and if so, the defendant was justified in arresting him. The sheriff is, *ex officio*, a conservator of the peace; and it is not only his right, but his duty to arrest all persons, with their abettors, who oppose the execution of process. And, as Sir Matthew Hale has observed, (2 *Hale's H. P. C.* 85,) these ministers of public justice "should have the greatest protection and encouragement in the due execution of their office." But the case is not such as to require the verdict to be set aside, on the ground merely of being a verdict against evidence, provided the law was laid down to the jury correctly by the court. The judge told the jury that the plaintiff was clearly entitled to recover. I apprehend that this expression was much too strong for the case; but still it was but mere opinion, and left the jury to exercise their own judgments upon the facts. But when the jury were told that the defendant could not authorize the persons left in the house in his absence, to arrest the rioters, and that it would have been unlawful to have opposed their escape, I think there was a misdirection in point of law, and one which very probably determined the verdict. The defendant had come to the place to execute the process, and meeting with a resistance in the plaintiff's house which he had not strength to subdue, he went back to Goshen for assistance, and directed the plaintiff and others to assist in preventing, in the mean time, the escape of the rioters. He must be deemed, in this case, to have been constructively present, so as to justify an arrest of the rioters, during his temporary absence, provided he was absent on that business, and this was a matter of fact for the jury. The sheriff may take the power of the county, if necessary, after resistance, to execute process. Every man is bound to be aiding and assisting, upon order or summons, in preserving the peace and apprehending offenders, and is punishable if he refuses. (2 *Hale's H. P. C.* 86.) The sheriff is *quodam modo*, present by his authority, if he be actually engaged in efforts to arrest, *dum fervet opus*, and has commanded and is continuing to command and procure assistance. When he is calling on the power of the county, or a requisite portion of it, to enable him to overcome resistance, it would be impossible that he should be actually present in every place where power might be

wanting. The law is not so unreasonable as to require the officer to be an eye or ear witness of what passes, and to render all his authority null and void, except when he is so present. He could not, upon that construction, use the power of the county with effect, and it would be attended with great inconvenience and danger to the administration of justice. The question in these cases does not turn on the fact of distance, so long as the sheriff is within his county, and is *bona fide* and strictly engaged in the business of the arrest. In the execution of civil process, where there was no resistance, it was held, by Lord Mansfield, in *Blatch v. Archer*, (*Cowp.* 63,) that the officer must be the authority to arrest, but he need not be the hand, nor present, nor in sight; nor is any exact distance prescribed. It is a question of fact for a jury, whether the officer was on that business, and so, *quodam modo*, present. The necessity of the doctrine of constructive presence applies with much more force, and ought to be received with much more liberality when the officer is serving criminal process, and meets with resistance. There are many instances in the books of persons convicted of felonies committed by them, as aiders and abettors, though far beyond the power of seeing or hearing the actual perpetration of the act. The cases proceed on the principle of mutual concert, aid and protection in the execution of one common design, and the doctrine equally applies to this case where the sheriff calls in aid to execute process. He is present, in judgment of law, by his authority, and every person who aids him in pursuance of his summons, acts under the same protection and the same responsibility, as if the sheriff stood in his view. This we consider to be a sound and essential principle, and if it had been stated to the jury, we cannot say that they would not have acquitted the defendant on the ground that the plaintiff had, contrary to his duty, aided or countenanced the escape of the rioters during the absence of the sheriff.

The case ought, therefore, to be reviewed by another jury, and a new trial is accordingly awarded, with costs to abide the event of the suit.

SPENCER, J. I cannot concur in the rule for a new trial. The idea that the defendant was constructively present, after his departure from the place where the defendants in the warrants were, and whilst actually absent, at a distance of several miles; and that

the persons whom he had stationed to watch those persons against whom he had process, were acting under his immediate orders, and had power to arrest those persons, appears to me quite extravagant. The offence on which the warrant was issued was a breach of the peace, and it cannot be pretended that for such an offence, then past, private individuals could arrest; nor will it be contended that the sheriff could authorize an arrest by parol, he being absent at the time. Chief Justice Holt doubted whether an arrest made by a bailiff's servant would be lawful even in the presence of the bailiff; and it was agreed that it would not be good, if the bailiff was not, *quodam modo*, in his company. (6 *Mod.* 211. *Bull. N. P.* 63.) In *Blatch v. Archer*, (*Cowp.* 63,) it was held, that an arrest must be made by the authority of the bailiff, but that he need not be the hand that arrests, nor actually in sight; but he must be so nigh as to be near at hand, and acting in the arrest; and in that case the bailiff was within thirty rods. I believe there is no case to be found carrying the doctrine of constructive presence further than that of *Blatch v. Archer*. If the officer is acting in the arrest, or if he is near at hand, then an arrest by his follower is his act. In the present case, I conceive that the defendant was not acting in the arrest, nor near at hand.

New trial granted.

SUPREME COURT.

VAN VOORHES v. LEONARD.

(1 *N. Y. Sup. Ct. Rep.*, 148. *Decided* 1873.)

If a person submits to an officer's control, after being informed by such officer that he has a warrant for him, it is a sufficient arrest.

A. J. Wilkin, for appellant.

J. & Q. Van Voorhis, for respondent.

<i>E. D. Smith, J.</i>	*	*	*	*	*
*	*	*	*	*	*

The charge of the judge was correct, that if the plaintiff submitted to the control of the officer upon being informed by him

that he had a warrant for him, it was a sufficient arrest, and, also, that the count for false imprisonment could not be sustained. Upon the whole, I think the case was fairly tried and submitted to the jury upon the law and the facts, and that the order and judgment should be affirmed.

So ordered.

SUPREME COURT.

THE NEW YORK AND ERIE RAILROAD CO. v. PURDY AND ADAMS.

(18 *Barbour*, 574. *Decided* 1854.)

When a railroad corporation was sued before a justice of the peace, and the constable returned, upon the summons, "personally served and by copy on E. L. W., a managing agent of the defendants;" it was *held*, that this was sufficient to give the justice jurisdiction of the person; and that he was not bound to require further evidence of the official position or character of the agent on whom the process was served.

Personal service upon the managing agent of a corporation, is personal service on the corporation; and if the constable's return shows such a service, the jurisdiction of the justice is established, and his judgment will be regular upon its face.

The fact stated in the constable's return cannot be contradicted, and shown to be false, collaterally, in another action, for the purpose of defeating the judgment and rendering the parties enforcing it trespassers.

The remedy of a defendant who is injured by the false return of a constable upon the summons, is to appeal, and allege errors of fact, or to prosecute the constable.

MOTION by the plaintiffs for a new trial, upon exceptions taken at the circuit. The action was brought to recover damages for the conversion by the defendants of a quantity of wood belonging to the plaintiffs, and sold by the direction of the defendants upon an execution issued on a judgment obtained in a justice's court, in favor of the defendants and against the plaintiffs. The defendants justified under such execution, and on the trial offered the docket of the justice's judgment in evidence, from which it appeared that there was no appearance by the defendants in that action, and that the only way in which the magistrate obtained jurisdiction of the corporation was by the return of the constable who served the

summons, which was as follows : " Personally served and by copy, on E. L. Wentz, a managing agent of defendants." The counsel of the plaintiffs objected to the introduction of the docket as evidence, on the ground that it did not appear from such docket that the justice obtained any jurisdiction of the defendants in that action, or that there was any competent proof before him of the proper service of the summons. The counsel further objected that the statement made by the constable, in his return, that E. L. Wentz was a managing agent of the defendants, was an extra-official act, and furnished no evidence of that fact ; and he insisted that the judgment rendered by the justice was therefore void, and furnished no justification to the plaintiffs therein for any acts done under the same. The justice decided that the return of the constable was a good and valid return, and that the statement therein, that Wentz was a managing agent of the defendants, was competent evidence of the fact, and that the justice had jurisdiction, and the judgment was valid. He therefore received the docket in evidence. The counsel for the plaintiffs then offered to show that on the trial of the former action, before the justice, the plaintiffs therein proved that Wentz was not, at the time the summons was so served upon him, a managing agent of the railroad company. This evidence was objected to, and excluded ; the judge deciding that the return of the constable was conclusive, and could not be disputed in this action. The plaintiffs then offered to prove that Wentz, at the time the summons was served on him, was not in fact a managing agent of the railroad company. This evidence was also objected to, and excluded. The judge instructed the jury to find a verdict in favor of the defendants and they found accordingly.

F. R. E. Cornell, for the plaintiffs.

F. C. Dininny, for the defendants.

By the Court, JOHNSON, J. The first question presented by the case is, whether the return of the constable gave the justice jurisdiction of the person of the defendants, in the suit before him. The return was " personally served and by copy on E. L. Wentz, a managing agent of the defendants." The defendants there were

the present plaintiffs. It is conceded that a managing agent is a person upon whom process may be properly served, and that service in fact upon him would be as effectual as upon the president, or any other officer. It is insisted, however, that the statement in the return of the official position or character of the person upon whom process is actually served, where a corporation is proceeded against, is not sufficient, but that the justice, before he proceeds in the action, or if he has entered upon it, should require some further evidence. But where a corporation is sued in a justice's court there is no other way of determining the question of jurisdiction over the party, except by the constable's return. The magistrate is to judge from that, and that alone, whether the process has been served in a manner to give him jurisdiction to proceed. His docket must show jurisdiction upon the face of the proceeding, or it would be presumed that he was acting without it, and it would be a singular proceeding in a magistrate, after taking up a cause for trial, to require proof outside of the process, and the return upon it, to establish his jurisdiction. It is not a traversable fact before him. The papers before him either show it, or they do not. If they do not, he cannot proceed, whatever parol proof may be offered. The object of the statute in requiring the constable to state in his return to a summons, "the time and manner in which he executed the same," was to enable the justice to determine not only whether it had been served within the proper time, and in the form prescribed, but whether it had been served upon the defendant or other proper person also. Upon the return by the constable, showing personal service upon the proper person, the justice acquires jurisdiction of the defendant. This has been often ruled, and is nowhere questioned, that I am aware of. If his jurisdiction then vests, he has acquired it in fact for all the purposes of enabling him to render a valid judgment, one which would not only protect him but all other persons acting in good faith under it, from being proceeded against as trespassers. It may be that such a judgment will be reversed upon appeal or *certiorari* for errors in the proceeding to obtain it. But that nowise affects the jurisdiction of the magistrate, where the proper process has been regularly issued and is returned personally served by the proper constable. His authority to proceed to trial and judgment is established by that. Personal service upon a managing

agent in this case was personal service upon the defendant, and as the return shows this, the jurisdiction of the justice was established, and his judgment is regular upon its face.

The next question is whether the fact stated in the return can be contradicted and shown to be false, collaterally, in another action, for the purpose of defeating the judgment. It is settled upon authority that it cannot. (*Putnam v. Man*, 3 *Wend.*, 202. *Bromley v. Smith*, 2 *Hill*, 517.) The offer was to prove that Wentz was not a managing agent of the defendants in the action, and thus to show that there had been no personal service. I am aware that the decision in the case of *Putnam v. Man* has been recently questioned by Justice Parker in *Fitch v. Devlin* (15 *Barb.*, 47), but it seems to me without sufficient consideration. Because the proof offered, to show the return to be false, even if made, does not go a single step toward overthrowing the jurisdiction of the justice. It is the statute which gives him jurisdiction to proceed and render judgment upon a certain fact being certified to him, in a prescribed form, officially. His jurisdiction does not, and never can be made to depend upon the fact of the return being true; a fact of which he can, in the very nature of things, have no knowledge whatever. The return not only makes out a *prima facie* case of jurisdiction as suggested by Mr. Justice Parker, but a conclusive one; and so far as that question is concerned, it is perfectly immaterial whether the return is true or false.

The power attaches upon the official return being made, and no subsequent discovery of the mistake, or fraud, of the officer making it, takes it away, or affects it in the least. It is too well settled that nothing but facts affecting the jurisdiction of the magistrate, to try the cause and render judgment, are competent to be proved collaterally to avoid the judgment, to require argument or authority to support the proposition.

It may operate harshly upon a defendant, to be deprived of the right of disputing and resisting a judgment obtained under such circumstances whenever and wherever it is interposed against him, and to turn him over to other remedies for redress. But cases of this kind must always be rare, and it is far better that a party should encounter occasional inconvenience and hardship, than that the jurisdiction of the judicial officer should rest on so slippery and unstable a foundation, as that in which a contrary ruling would

place it. The defendants are by no means remediless. They might have appealed and alleged errors of fact, as in the case of *Fitch v. Devlin* (*supra*), or they might have prosecuted the constable for a false return. A new trial should, I think, be denied.

SUPREME COURT.

HARVEY v. LANE.

(12 *Wend.*, 563. *Decided* 1834.)

A receipt taken by a constable for the delivery of property seized by him under a justice's attachment is a valid instrument.

It is, however, a good defence to the *receiptor*, that the property has been taken from his possession by the *rightful owner*.

ERROR from the Oswego common pleas. Lane sued Harvey in a justice's court, and declared on a receipt for property entrusted by him to the defendant, to be returned when called for. He averred that he had demanded the property, and that the defendant had refused to deliver it. The defendant pleaded the general issue, and gave notice of various matters that he would prove on the trial of the cause. On the trial the following facts appeared: On the 23d October, 1832, Lane, as a constable, by virtue of an attachment issued by a justice of the peace, in favor of John Jakway against John Harvey, seized certain goods and chattels as the property of John Harvey, and upon that occasion Elisha Harvey (the now plaintiff in error) executed a receipt to him, Lane, in which he acknowledged to have received various articles of property, particularly specified in the receipt, which he agreed to deliver when called for. On the 28th of January, 1833, Jakway recovered judgment in the attachment suit for \$19.26 damages and costs; on which an execution was issued on the 8th March, 1833, and delivered to Lane, who, on the twenty-fifth of the same month demanded of Elisha Harvey the property specified in the receipt which Harvey refused to deliver. The plaintiff proved the value of the property, and rested. When the plaintiff produced the receipt the defendant objected to its being read in evidence, on

the ground that a constable was not authorized by law to take such an instrument, and that therefore it was void; the objection was overruled by the justice, and the receipt received in evidence. The defendant proved the following facts: That on the 20th October, 1832, he issued a *distress-warrant* for rent due to him from John Harvey, for premises belonging to him, occupied by *John Harvey*, by which he directed his bailiff to distrain goods and chattels to make the sum of \$37.35; and made an affidavit of the amount of rent due, which was sworn to before a *justice of the peace*, and filed in the town clerk's office on the 12th November, 1832; on the day of the issuing of the distress-warrant the identical property which was subsequently seized under the attachment was levied upon by the bailiff, and sold by him on the 30th October, 1832. The defendant then offered to prove that the goods, at the time of the seizure under the *attachment*, were not the property of John Harvey; and that after the seizure, and previous to the demand made by the plaintiff for the delivery of the goods, *the rightful owner of the property took the goods from the defendant without his consent*; which evidence was objected to by the plaintiff as inadmissible, and excluded by the justice. The jury, under the charge of the justice, found a verdict for the plaintiff, for the amount of the execution in the case of *Jakway*, on which verdict the justice rendered judgment. The defendant removed the cause by *certiorari* into the Oswego common pleas, where the judgment of the justice being *affirmed*, the defendant sued out a writ of error.

W. F. Allen, for the plaintiff in error, insisted, *first*, that the evidence offered by the defendant that the property was taken from him by a person having paramount title ought to have been received, and cited *Edson v. Weston*, 7 Cowen, 278; 2 Comyn on Cont. 340; *Comyn's Dig. tit. Action on the case for Misfeasance*, a, 3. *Second*. That the receipt was unauthorized by law, and therefore void. Admitting that a constable on *final process*, may take a receipt for property levied upon, he cannot do so for property seized under an *attachment*, because the execution consequent upon the attachment may go into the hands of another officer; because the statute directs that in cases of attachment the constable shall "attach, take into his custody and safely keep" the

property ; and because the form of the security varies from that prescribed by statute, which the constable may take, if he does not remove the goods. 2 *R. S.* 231, § 31, 32. 8 *Johns. R.* 98. 5 *Wendell*, 61.

D. H. Marsh, for defendant in error.

By the Court, NELSON, J. There is no valid objection to the taking of a *receipt* by a constable, for the delivery to him at a future day of property seized under an *attachment*. The statute 2 *R. S.* 231, § 31, requires that the constable shall attach, take into his custody and safely keep the goods ; but it would be very inconvenient, and often impracticable, for him personally to take the custody of property thus seized, and from necessity he must sometimes trust it to others. When he does so, it is still *in his custody* by intendment of law, and he is responsible for it in like manner and to the same extent as though he had it in his actual possession. There is nothing in the statute inhibiting the use of a *receiptor*, and convenience, and in many instances necessity, requires that the practice should be sustained. The removal of the goods may be prevented by any person executing a bond with sufficient surety that they shall be forthcoming at a future day, 2 *R. S.* 231, § 32 ; but if such bond be not given, the constable must see that due care be taken of the property.

The defence under the distress for rent failed, for the defect of the affidavit of the amount of rent due ; it was not taken by a proper officer. 9 *Wendell*, 340.

But the justice erred in rejecting the evidence that the property was taken from the *receiptor* by virtue of a paramount title. Such defence would have been available to the *officer*, and why should it not be to the *receiptor*, the possession of the goods in judgment of law being in the officer. To decide otherwise, in order to do justice, we must or should hold, that the party having the paramount title had no right to enforce it. The rights of the *receiptor* and of the constable in this aspect are identical ; those of the former are at least as perfect as those of the latter. The principle upon which this defence rests is sound, and would have received the sanction of the court, had it not already been adjudged in the case of *Edson v. Weston*, 7 *Cowen*, 278, which is directly in point.

It would be an extraordinary rule of law that would require the receiptor to defend the property against all the world (including the rightful owner) except the constable, when the latter had no title to it; and it would be equally strange to hold the constable accountable to the plaintiff in the execution or attachment, when the *rightful owner* had taken the property, and the process under which the officer had taken it would not hold it. It may well be doubted whether the receiptor is responsible to the officer, to the same extent that the latter is to the plaintiff in the process. 7 Cowen, 278. 1 *id.* 334.

Judgment reversed.

SUPREME COURT.

PHILLIPS AND OTHERS v. COOK.

(24 Wend., 389. Decided 1840.)

The rule of proceeding expressly laid down in the books is, that under a *fi. fa.* against one of two partners, the sheriff may seize the entire partnership effects so far as may be necessary to satisfy the execution; he must sell that partner's share against whom the execution is, and duly deliver the same; and then the vendee becomes tenant in common with the other partner.

B. Davis Noxon, for the defendant.

J. Wilkinson, for the plaintiffs.

By the Court, COWEN, J. A point is now made on the validity of the levy; but it was not raised on the trial: the only question is whether *trespass* will lie against the sheriff for seizing and selling under a *fi. fa.* the property of an insolvent firm, to satisfy the individual debt of one of the members. The action here is the same as if it had been brought by the partners, it being by trustees, claiming under an assignment made subsequent to the levy. The question has been a good deal discussed before us in consequence of some apparent conflict in the cases, and a difficulty upon them, felt more by the other members of the court than by myself. For

one I never could bring myself to doubt *a priori*; nor have I been able to see any serious discrepancy in the adjudications. Not a single authority has been shown for maintaining this action; nor any intimation to that effect, although the question stood over in *Thurber v. Lewis*, for several terms, under directions to re-argue. The whole doctrine is gone into a distinct section of *Collyer on Partnership*, 473, to 478, *Am. Ed. of 1839*, where several of the most material cases, English and American, are cited. The result is, that at law, the sheriff may *seize and sell* the interest of a partner in all choses in possession, the same as he may that of any joint tenant, or tenant in common. Partners are joint tenants in the stock and all the effects; they are seized *per mi et per tout*. *Collyer*, 64. And the rule of proceeding expressly laid down in the books is, that under a *fi. fa.* against one the sheriff must seize the entire partnership effects, so far as may be necessary to satisfy the execution; he must sell that partner's share against whom the execution is; and then the vendee becomes tenant in common with the other partner. *Backhurst v. Clinkard*, 1 *Shower*, 169. *Holt*, 643, *S. C.* *Heyden v. Hayden*, 1 *Salk.*, 392. The doctrine of these cases has never been doubted; but has been as often reaffirmed as the question has been mentioned by courts or in any of the Treatises on Partnership. It was adjudged in *Jacky v. Butler*, 2 *Ld. Raym.* 871, and in *Marriott v. Shaw*, *Com. Rep.* 275, 277. The true rule was laid down by Holt, Ch. J., in *Pope v. Haman*, *Comb.* 217: "Upon a judgment against one partner, the sheriff may take the goods of both in execution; and the other co-partner has no remedy at law, otherwise than by retaking the goods if he can; for the vendee of the sheriff becomes tenant in common with the other co-partner." This is but saying what every one would, who has studied the text of Littleton, Co. Litt. § 323, 199, b. So far as this section and Coke's Commentary pertain to the question, they are both adopted in *St. John v. Standring*, 2 *Johns. R.* 468.

It does not appear to have been doubted in any age of the law, that the sheriff might take and sell the separate partner's interest. The questions have been whether he might not sell the whole interest of both, on a *fi. fa.* against one; or whether he could seize the whole. The answers in all the cases have been, you must seize the whole, and sell only the moiety belonging to the debtor. These

were called old cases on the argument; the antiquity of those cases only adds to their strength. They are all, however, since the revolution of 1688, ranging from William and Mary down to the Georges. They were cited and approved by Lord Kenyon, in *Smith v. Stokes*, 1 *East*, 363, 367. More than that, they were expressly affirmed by a decision of this court. *Schrugham v. Carter*, 12 *Wendell*, 131. The entire partnership property was there taken under an execution against one, and this court held that *replevin* would not lie by the assignees of the firm. Savage, Ch. J., laid down the law as it was understood by Holt, Ch. J., in the reign of William and Mary.

It was admitted in argument that the sheriff may seize, but it was said that neither he nor the purchaser can remove the property, whereas the cases at law are all express that he may sell, from *Holt* down to the 12 *Wendell*. The distinction sounds singular on its face. For what purpose does a sheriff seize property on a *f. fa.* if not to remove and sell it? But his power was assailed *a priori*, and it was said he can exercise no greater power over the property than the copartner against whom the execution goes; that by the levy, the sheriff is but a tenant in common, who must wait his chance, and take the goods when he can; but he cannot remove them if his co-tenant be unwilling and hold on to the possession, without committing a breach of the peace. If this were so, the reason would be a perfect *non sequitur* as to the right of suing in trespass *de bonis*, trover or replevin, however it might entitle the co-tenant to sue for an assault in wresting the property from him. *Hyatt v. Wood*, 4 *Johns. R.* 150, 159, 160. But is the law so absurd as to command a sheriff by its writ to seize and sell an article, yet forbid him to remove it, or declare him a breaker of the peace for selling it, because he resisted, and put to the exercise of force? This is a sort of imbecility which the common law has been careful to avoid in all cases. When it directly commands an officer to do any act, it impliedly gives him the power and means of performing it, and in nothing is this rule more conspicuous than in the execution of a sheriff's power. But it cannot be necessary to pursue the question through a course of reasoning, for the sheriff's right at law is settled by the authority of this court. *Wilson & Gibbs v. Conine*, 2 *Johns. R.* 280, is not opposed to it. There both the partners sued in *trover* for a seizure upon execution

against one; but they recovered merely because the defendant failed in his formal proof of the decree on which the execution issued. On motion for a new trial, the preference of partnership creditors was recognized, on the ground, as expressly stated, that the motion appealed to the equity of the court. They did not pretend to deny the sheriff's legal right, though he had seized and sold a consumable article, after being forbidden by the plaintiff, and the purchaser had actually taken it away. No one even hinted that the sheriff wanted the legal power, provided his authority had been shown. *Vide per Kent, Ch. J. at p. 282.* There are, I concede, some respectable *dicta* which favor an action at law by the partner who has been thus dispossessed: the action being in his name alone. Such is that of Putnam, J. in *Rice v. Austin*, 17 *Mass. R.* 206, 7, and Parker, J. in *Gibson v. Stevens*, 7 *N. H. Rep.* 357, 8. Putnam, J. cited no authority, and professedly spoke hypothetically. The point was not raised and finally decided in either of the cases; and Parker, J. admitted himself to be speaking on a difficult branch of the law. I have looked into the three cases cited by him. Two of them avowedly go on the ground of equity—impliedly therefore admitted the law to be different from what the learned judge understood it to be. The third was a case of tenants in common, the sheriff having expressly sold the whole under an execution against one. *Melville v. Brown*, 15 *Mass. Rep.* 82. *Vide White v. Osborn*, 21 *Wendell*, 72, *S. P.*, as to a sale of the whole by one of two tenants in common. It would be different, even in such a case, should the sheriff sell only the proper share, though he seized the whole, as he must. Clearly, it cannot be denied, that a copartner has as great an interest at law, and even a greater, than a simple tenant in common; nor that if the sheriff can on a *fi. fa.* against one of several tenants in common, take the whole chattel and sell the moiety in despite of opposition from the co-tenant, he may do so as against the co-partner. That he may do it in the former case was directly held in *Messereau v. Norton*, 15 *Johns. R.*, 179. He had, under an attachment against one tenant in common, seized and taken a yoke of oxen from the actual possession of the other, and proceeded to sell them; and they were taken away by the purchaser, though the co-tenant forbade the sale. He brought trespass; but this court held it would not lie, citing as authority the

very case of *Heyden v. Hayden*, respecting the sheriff's authority against one of several partners. In *Shaver v. White*, 6 *Munf.*, 110, the attachment was sued out against one of two partners, and 300 head of cattle taken by the sheriff, out of the possession of both; and they brought trespass for the taking. The action was against the plaintiff in the attachment, who directed the sheriff to levy. The court held that the action would not lie, and pronounced their opinion, also, that it could not be maintained against the sheriff, citing *Heyden v. Hayden*. The argument for such an action goes the length of saying that when a man puts his property into partnership, it is actually protected against a levy at the suit of his individual creditors; that it is exempt from execution, like his ten sheep or his cow, under the statute. A debtor has but to form a partnership, and he may set executions at defiance, so far as his own debts are concerned, still possessing and trading upon that very capital contributed by his individual creditors. It was thought singular by a learned judge in Pennsylvania, that even the qualified exemption allowed in such a case by a court of chancery, should not have been repudiated as contrary to the statute against transfers to defraud creditors. He said "that a contract which enables the parties to keep a class of their creditors at bay, and yet retain the *indicia* of ownership, should not have been deemed within the statute of Elizabeth, is attributable exclusively to the disposition universally manifested by the courts of justice to encourage trade." *Gibson, Ch. J. in Douer v. Stauffer*, 2 *Penn. R.* 204. To give an action of trespass by the partners, would make the contract equivalent to the protection afforded by the owner's dwelling-house. It would be putting it under perpetual lock and key as to all his private debts.

It is supposed that *Dob v. Halsey*, 16 *Johns. R.* 34, gives countenance to this action. That was assumpsit, by two out of three partners, to recover the price of goods sold by a third, because he had turned them out in payment of his private debt. The plaintiffs were nonsuited, on the ground that all the partners had not joined. The action was a singular one. The decision seems to suppose that after a partner has sold the goods of the firm in payment of his honest debt, without any fraud as against himself, he may join his co-partners in an action to recover the price of the goods—a price which, when recovered, he may release and still use

the avails for his individual benefit. Admitting his co-partners to have been defrauded by the sale, a bill in equity against him and the vendee, would seem to be the more obvious remedy. In *Rodrigues v. Heffernan*, 5 *Johns. Ch. R.* 417, a bill was filed and relief obtained in that form, for such an injury. The state of accounts between the partners should be inquired into, and if the firm be not injured, the vendee should not be disturbed. He has obtained no more than the law would give him, on execution, against the man from whom he received the goods. Independently of an account, and especially where the action at law is in the name of all the partners, I cannot but think the decision of the supreme court of appeals of Kentucky in *Owings & Co. v. Trotter*, 1 *Bibb*, 157, denying an action to the firm, more in accordance with the law and justice of the case.

In the State of Vermont, all preference of partners or their creditors by way of lien over an attachment or execution for the debt of a sole partner has been entirely repudiated, both at law and in equity. *Reed v. Shepardson*, 2 *Verm. R.* 120.

On the other hand, there is no doubt of the *equitable rule* in England, New York and most of the states, that, though the sheriff may at law levy on and sell the right of the individual partner, which shall pass absolutely to the purchaser, yet he takes subject to an account between the partners, which if it eventuate against him, his purchase may go for nothing. That, however, is his own look out. It is no reason why the creditor should be deprived of his legal right to sell, or the purchaser of his right to buy. In *The King v. Sanderson*, *Wightw.* 50, 53, Macdonald, Ch. Baron, said: "In cases of execution by a subject, it is generally settled that the whole must be taken in execution and sold, and the purchaser becomes a tenant in common with the other partners." *Vid. United States v. Hack*, 8 *Pet.* 271, 275, 276. The English cases to this effect are collected in a note to *Smith's Case*, 16 *Johns. R.* 106 to 109. The very idea of going into equity concedes the right to the sheriff to sell at law. On the question coming before Chancellor Kent, he refused to restrain the sheriff, admitting his absolute right at law not only to levy, but sell. *Moody v. Payne*, 2 *Johns. Ch. R.* 546. The bill was filed by the co-partner of the debtor. So in *Brewster v. Hammet*, 4 *Conn. R.* 540, the common goods were attached for the debt of one partner; but, on execu-

tion coming out, stayed in the hands of the sheriff. On bill filed by the other partners, though the firm was insolvent, the court denied them any relief, saying the property would be safer in the hands of the creditor, than if delivered back to the *insolvent partners*. Hosmer, Ch. J. said: "If the creditor take the property, he assumes a liability to the equitable demands of the creditors of the firm upon him; and their interest will be better promoted by leaving them to the redress, to which they have a claim, than by placing the fund in the possession of their insolvent debtors." He reviewed the cases, and concluded that the equitable property in the goods was vested in the creditors of the partnership; but added, "in all events the partners have no equitable claim to the restoration of the goods." They were of course sold by the sheriff at law; and taken entirely away from the partners. The bill was simply dismissed. Thus the doctrine is not only of an equitable nature purely, but even in a court of chancery is received under various qualifications and restrictions which can never enter into an action at law. In *Hoxie v. Carr*, 1 Sumner, 181, Story, J. says: "Upon a dissolution of a partnership, each partner has a lien upon the partnership effects, as well for his indemnity against the joint debts, as for his proportion of the surplus. But the creditors of the partnership, as such, have no lien upon the partnership effects for their debts; *their equity* has been truly said to be *the equity of the partners*, and is to be worked out through the rights of the latter." It follows that, if there be no creditors, no claim of surplus, or if the partners be insolvent, even a court of chancery will withhold its aid. That the lien is purely equitable, may be inferred from what was further said in the case cited; viz, a purchaser *without notice* holds discharged of the lien. It is in its nature, therefore, no more than the lien raised in chancery for the purchase money of an estate. Story, J., was speaking on a bill filed by a co-partner to enforce the lien against a purchaser; and that chancery alone is the forum ordinarily resorted to, may be seen by various other cases which treat of the same subject. *M'Culloch v. Dashiell's Admr.* 1 Harr. & Gill. 96. *Story v. Moon*, 3 Dana's R. 331, 334. *White v. Dougherty*, Mart. & Yerg. 309. *Gilmore v. The North American Land Co.* 1 Peters' C. C. R. 460, 465. *Pierce v. Pass*, 1 Porter, 233. In *M'Donald v. Beach*, 2 Blackf. 55, 58, Holman, J., said: "It is contended that the separate debt of

one partner should not be paid out of the partnership estate until all the debts of the firm are discharged. This doctrine is correct, but it does not apply until the partners cease to have a legal right to dispose of their property as they please. It is applicable only when *the principles of equity* are brought to interfere in the distribution of the partnership property among the creditors."

I admit that courts of law have sometimes felt able to apply this equitable doctrine. One instance is, where an action for a false return was brought against the sheriff, on the ground that he had omitted to levy on partnership property under the process of domestic attachment or *fi. fa.* against an individual partner. *Dunham v. Murdock*, 2 *Wendell*, 553. *Pierce v. Jackson*, 6 *Mass. R.* 242. *Phillips v. Bridge*, 11 *Mass. R.* 242, 249. *Commercial Bank v. Wilkins*, 9 *Greenl.* 28. *Tappan v. Blairsdell*, 5 *N. Hamp. R.* 189. This is on the obvious ground that the plaintiff has lost nothing but that of which the court of chancery would deprive him; and the sheriff ought not to be held accountable for doing what the court of law sees that a court of equity would have compelled him to do. So the equitable right was tried at law where a partner sold out his share, covenanting against liens; the balance on an account, *inter se*, was decidedly against him, for which it was held his co-partner had a lien, and so the covenant violated. *Hodges v. Holeman*, 1 *Dana*, 50, 53. Other like instances exist, some of which I shall hereafter have occasion to notice.

It is said this court is in the habit of arresting the sheriff's proceedings on the application of the debtor's partner, that it will order an account to be taken by the clerk, and then direct the sheriff to pay such share of the proceeds to the co-partner as shall appear to be his due. Something like this was indeed done in *Eddie v. Davidson*, *Doughl.*, 650. The case, however, recognized the sheriff's right to sell, and the order was in terms to pay a part of the *money levied*, to the assignees of the co-partner. The assignees obtained the order. A like order was made A. D. 1816, in *The King v. Rock*, 2 *Price*, 198, on motion by partners; and the court said there had been many instances of such a reference, but they denied an *amoveas manus*, thus recognizing the right to sell. *Vide note*, *id.* 198. Lord Eldon said, A. D. 1813, in *Waters v. Taylor*, 2 *Vesey & Beames*, 301, "According to the old law, I

mean before Lord Mansfield's time, the sheriff, under an execution against partnership effects, took *the undivided share* of the debtor without reference to partnership accounts: but a court of equity would have set that right by taking an account, and ascertaining what the sheriff ought to have sold. The courts of law, however, have now repeatedly laid down that they will sell the actual interest of the partner, professing to execute the equities between the parties, but forgetting that a court of equity ascertained previously what was to be sold. How could a court of law ascertain what was the interest to be sold, and what the equities; depending on an account of all the partners for years?" The action of the courts of law, however, seems not to have been by any means so uniform as Lord Eldon supposed. The rule alluded to by him had been applied for to the chief baron in *Chapman v. Brooks*, 3 Bos. & Pull. 289, but the application was unanimously refused; the court all saying the question belonged to a court of equity; that they had no power to take an account: and that the sheriff had a perfect right to go on and sell. Lord Alvanley said he hoped that would be the last application of a similar kind. [See two like cases before that in the same book, pp. 254 and 288.] Chambre, J. mentioned that in *Eddie v. Davidson*, no objection was made to the sale; but there was merely an application for a share of the proceeds after sale; and no objection to the motion by the party levying. In *Parker v. Pistor*, 3 Bos. & Pull. 288, 289, the court said all the difficulties were to be encountered in equity, the case being plain at law. "The safest line of conduct for the sheriff to pursue, was to put some person in possession of the defendant's share *as vendee*, leaving him and the parties interested, to contest the matter in equity, where a bill might be filed stating that he had taken possession of the property, and praying that it might not be disposed of until all the claims were arranged." This appears to be the approved practice in Connecticut. *Witter v. Richards*, 10 Conn. R. 37, 43, *per Williams, J.* who cites and approves the direction in *Parker v. Pistor*.

But admitting that this court would interfere on a non-enumerated motion, that would be but equivocal evidence at best that the lien in question is of a legal character. Such a motion is very often in principle the mere substitute of a bill in equity. There are divers cases in which courts of law have recognized and

acted upon the lien when it arose collaterally; but these present exceptions to their ordinary course. They have not, in any instance that I can find, allowed the preference as matter of law; but only availed themselves of an accidental relation or condition, to apply it as the rule of equity. In all such acts, they admit themselves to be out of their natural element. We have seen several instances already, and I will notice a few other cases, in which the question has been considered by courts of law: some taking measured steps, and others declining all interference. In *White v. The Union Insurance Company*, 1 *Nott & M'Cord*, 556, the defendants were bound to pay dividends on stock belonging to a firm. The dividends became due, and were declared, after the sole surviving member of the firm had assigned the partnership effects to trustees for the payment of partnership debts, the firm being insolvent. An action was brought to recover the dividends, and held to be sustainable in the name of the assignees. The defendants proposed to set off a debt of the surviving partner alone. The peculiar shape of the action and position of the parties here, enabled a court of law to let in the equitable doctrine, which they did. Yet the legal doctrine is well settled as a general one, that where a surviving partner sues for a debt of the firm, whatever he owes in his individual character to the defendant may be set off. The learned judge (Bay, J.) who delivered the opinion of the court, admitted this to be so, citing *Mont. on Set-off*, 24. *Vid. also Meader v. Scott*, 4 *Verm. R.* 26, 29, and *The Same v. Leslie*, 2 *id.* 569. But the learned judge thought the doctrine must be confined to cases where the firm is solvent. Yet how is that to be decided without a general account? In *Schatzill v. Bolton*, 2 *M'Cord*, 478, the funds of a firm were seized on foreign attachant against one of the partners for his sole debt. The court, by Richardson, J. said it was too well settled to be questioned that partnership property is liable to be taken in execution against one of the partners; citing some of the English cases and our case of *Mesereau v. Norton*. He added, the possibility of there being liens by partnership creditors which may take away the chattel from the purchaser, is no objection to the sale. There being a lien on property, as by mortgage, &c. does not prevent a sale subject to the lien, &c. The right against one of several partners in virtue of a foreign attachment, forms a conspicuous head in the American books.

Knox v. Schepler, 2 *Hill*, 595, was the case of a foreign attachment against a surviving partner for his individual debt. He owned one-third of the partnership effects. The court held that the attachment lay; but though at law he owned the whole by survivorship, they ordered but one-third to be paid over to the attaching creditors. This was one-third gross, for the court refused to take an account. Under the circumstances, however, they required the attaching creditor to give bond with surety, that they would abide the event of an account as between the partnership rights, and refund in favor of them and partnership creditors, on the principle of equitable preference, should that be so decreed. Harper, J. said that had been the course in *Schatzill v. Bolton*. Then, speaking of the one-third in question before him, "Can we," he asks, "go into an investigation of the equities which may exist against it? Can we determine that there are creditors of the firm having a better claim to his fund? or that upon a legal accounting with the representatives of the deceased partners, the *absent defendant* may not be found a creditor of the firm, and entitled to retain all he has in his hands; or indeed that there has not been a final accounting, as the partnership seems to have been long dissolved?" The inquiry was declined.

Even the supreme court of Pennsylvania, possessing as they are known to do both equitable and legal powers, decline stopping to take an account. In *M'Carty v. Emlyn*, 2 *Dall* 277, 2 *Yeates*, 190, *S. C.*, the money of a firm was seized by foreign attachment for the separate debt of a surviving partner. His interest was one half. The counsel of the garnishee moved a stay till an indemnity could be obtained against the foreign attachment. The motion was denied, and one half the money was ordered to be paid over absolutely to the plaintiff. M'Kean, Ch. J. and all the court admitted the rule in equity. But he animadverted on the granting of such an application. He said "a partner may owe separate debts, and his property may consist of partnership stock; yet if the objection prevails, it is impossible to conceive when the separate creditors will be able to make that property responsible. While the partnership continues, how shall they compel a disclosure and liquidation of all the debts and credits of the company? and even when a partnership is dissolved, where will the separate creditors find the inclination or the power to scrutinize and close the records

of a long and complicated mercantile connection? But the law is happily otherwise: for it has been repeatedly settled here as well as in England, that a partner may be sued for separate debts; that the partnership effects may be taken in execution and sold *by moieties*; and that the purchaser of the moiety, under the execution, shall be considered as tenant in common with the partner owning the moiety." All this he considers proved by the very case before Lord Mansfield, *Eddie v. Davidson*, now relied on to show the contrary. The doctrine was afterwards glanced at in *Knox v. Sumners*, 4 *Yeates*, 477. A levy had been made under a *fi. fa.* for the separate debt of one partner, and there was a subsequent levy under a *fi. fa.* for the joint debt. As between these conflicting levies, the execution for the separate debt was postponed to the other; but mainly on the ground of fraudulent delay after the first was levied. In 1829, the important case of *Doner v. Stauffer*, 2 *Pennsyl. R.* 198, was heard and much considered. All the partnership effects had been levied upon and sold under executions against two partners for their separate debts; some against one and some against the other. The firm was *insolvent*, and one of the partners sought to have the avails for which the effects had sold applied in payment of the firm debts, claiming that he was answerable for the whole debts of the firm. The court held, that *under the circumstances*, it did not lie with him to interpose; that neither he nor his co-partner had any interest remaining, nor could the joint creditors claim through the partners; that all the interest, legal and equitable, of the latter was gone. The court examined the right acquired by the purchaser under the separate executions. Gibson, Ch. J., in delivering their opinion, entered into a learned examination of the principle on which the preference of partnership creditors rests, and came to the well settled result that the execution creditor sells and the purchaser takes, not the chattels of the partnership, but *the interest of the partner incumbered with the joint debts*. That the creditors of the firm have therefore no claim to the proceeds of the sale, which must consequently be paid over to the execution creditor of the separate partner. The recourse of the firm creditors is necessarily to the property in the hands of the purchaser.

Several other cases in different parts of the Union have presented and discussed the question when it arose in the proceeding by

foreign attachment; some refusing to recognize the preference, and others going strongly to favor it; more strongly even than the South Carolina cases. Among those denying the preference, is *Wallace v. Patterson*, 2 *Har. & McHen.* 463. Among those going most strongly to favor it, are *Gardiner v. Smith*, 12 *Lou. R.* (Curry,) 370; *Church v. Knox*, 2 *Conn. R.* 514; *Fisk v. Herrick*, 6 *Mass. R.* 271; *Upham v. Naylor*, 9 *id.* 490; *Barber v. The Hartford Bank*, 9 *Conn. R.* 407, and *Lyndon v. Gorham*, 1 *Gallis.* 367. The great favor generally shown to partnership property in New-England as against a foreign attachment for the debt of one, did not get a foot-hold without able resistance. I allude to the dissenting opinion of Hosmer, J. in *Church v. Knox*, 2 *Conn. R.* 522. At most, it now stands but as an exception to the general rule. In *Lyndon v. Gorham*, Story, J. said: "I consider that the present [foreign attachment] is a process in the nature of a bill in equity, to reach the funds of a debtor, and subject to all the liens and equities between the original parties; and in order to do complete justice, it is necessary that all proper parties should be before the court." 1 *Gall.* 370. In the 1st vol. of his *Treatise on Equity*, 625, *ch.* 15, § 675, he says the preference seems incapable of being enforced in any other manner than by a court of equity: at law, he says, it is generally disregarded.

So far the cases fully illustrate the position, that in whatever form the preference in question has been enforced, whether directly by chancery or by action on motion, or by foreign attachment, the courts have always considered themselves as departing from strict legal right, and administering an equity. Such also was the case of *Crane v. French*, 1 *Wendell*, 311, on non-enumerated motion. The sheriff holding two executions, one against the firm, the other against a single member of it, sold the common property; and this court directed him to prefer the joint execution in the distribution. Chancery cases were manifestly cited as authority. The only case in a court of law at all relied upon was one in this court evidently depending upon the same equitable principle. *The Matter of Smith*, 16 *Johns. R.*, 102. That was the case of an attachment under the absconding debtor act, which, like a foreign attachment, covered all choses in possession and action of the debtor; and this court took it upon them to declare the extent to which such an attachment, founded on the debt of an individual, should operate

on the effects of his co-partners. Under the circumstances, they ordered the partnership books, goods and moneys to be restored to the co-partner not proceeded against, saying he had a right to retain them for the payment of the partnership debts. They said the case of partners is different from that of tenants in common of a chattel. All that is undoubtedly so in equity: and it is evident the court speak in the light of equity, for they concede the legal right, in the language of the cases decided under the legal rule. The identical question before them was afterwards entertained by Chancellor Kent on a bill in equity, *Robbins v. Cooper*, 6 *Johns. Ch. R.*, 186, though we have seen he refused to interfere with an execution in a like case. Who ever heard of a right of action growing out of an equity? an action of trespass like the one before us, or like *Lewis v. Thurber*? Suppose the court had not stopped the sheriff in *Smith's case*, would he have been a trespasser in selling? They said the attachment was like an execution; yet in both the leading cases upon execution before cited from *Doug.* and *Bos. & Pull.* the court sanctions a sale: in the one giving a direction as to the proceeds, and in the other refusing to interfere. In *Smith's case*, this court mentioned *Fox v. Hanbury*, *Cowp.* 445, 449. But there the whole reasoning of Lord Mansfield and his judgment in the case, and all the authorities cited by him, concede the power of the sheriff to sell, and of the purchaser to take and convert to his own use. He admits this in every shape, both at law and in equity. Only in the latter case he says the vendee takes as tenant in common, but subject to an account. No one has denied that, since 1776. It is the law of another court, where a tenant in common always holds subject to some sort of account. But his rights at law are not therefore the less. He may take and remove the goods and enjoy them exclusively; but must account for the profits. If they are partnership goods, and that known to him, equity will, under circumstances, also hold him to account for the full value in favor of partners, or through them, to creditors.

The attempt to enforce the equitable rule at law in the form of trespass or trover against the sheriff or purchaser has failed, even where the sheriff proceeded under foreign attachments, in respect to which the preference of the joint creditors has been singularly favored. *Shaver v. White*, before cited from 6 *Munf.* is one instance. The seizure was there under foreign attachment against

one of several partners, for his sole debt, on which the cattle of both partners were taken contrary to their consent, yet an action by both was held not to lie. In December term, 1839, an action of a like character was heard at the suit of the partner not named in the foreign attachment, and decided against him by the supreme court of Pennsylvania; *Morgan v. Watmough*, 5 *Wharton's R.* 125. This case seems to have been well argued, and the doctrine in the New-England cases was especially urged as giving countenance to the action. Thus, whether the action has been brought by both partners or by one, it has so far always failed. Authority and principle are equally against it. I do not deny that there are *dicta* which look like a restraint on the sheriff. In *Crane v. French*, 1 *Wendell*, 313, it was said the sheriff does not deliver possession. With deference, *I do not see that the authorities will justify his refusal to deliver possession*, either at law or in equity, except under the sanction of some court qualified to direct him in such a course. It is not necessary to deny that this court may do so under special circumstances; though the power of this court, or even of a court of equity, to interfere and stay execution till an account shall be taken, cannot, I think, be sustained. It seems to me that Chancellor Kent was right in the case cited when he refused to stay a sale even in equity; and that the advice of the English common pleas and other courts should be followed: that is, to let the sheriff take his course according to his undoubted legal right, selling the goods, and leaving the co-partners and co-partnership creditors to their relief in equity. I know that since the cases of *Dob v. Halsey* and *The matter of Smith* in 16 *Johns. R.* and *Crane v. French*, an impression has prevailed that the sheriff might be controlled by a motion; and that this court might even stop him, and order an account. No case in any court has gone the length of saying that; but it has again and again been denied; and that sort of relief has often been refused. I remember nothing of the practice of this court; nor do I believe that either justice or convenience calls for its adoption. It seems to me the English common pleas were right when they said the conflict between suitors for joint and separate debts can be settled by chancery alone. Creditors and partners not before the court must be made parties, complicated accounts for years must be settled, a large concern to be wound up perhaps. This court has neither the abstract power, the process, the officers,

nor any of the proper machinery for prosecuting such a business. How is this court to decide on motion, even whether there be a partnership or not? Be this as it may, however, and whether we ought to interfere summarily or not, the argument can have no bearing in favor of this novel remedy by *trespass* or *trover*.

My opinion is that a new trial should be granted; the costs to abide the event.

SUPREME COURT.

RATHBONE v. MORRIS.

(9 *Abbott*, 213. *Decided* 1859.)

Where on appeal a party gives security, the effect is to stay further proceedings on the judgment, stopping the party where he was at the time of giving the security.

The case of *In the Matter of Berry*, 26 Barb., 55, fully sustained.

INGRAHAM, J. The defendant has given the necessary security on appeal, and has obtained an order allowing the sureties after justification. He now moves for an order superseding the execution issued before he appealed, and under which a levy had been made.

Section 339 of the Code, which prescribes the effect of security on appeal, gives it no other virtue than to stay further proceedings on the judgment; it discharges or vacates nothing, but merely stops the plaintiff where he was at the time of giving the security, leaving him in possession of any rights or security previously obtained. It gives the court no authority to vacate any proceeding, or release any right previously acquired.

The same practice prevailed under the old system (*Blanchard a. Myers*, 9 *Johns.*, 66; *Kinney a. Whitford*, 17 *Ib.*, 34), and it was only where the execution was issued within the four days, or while the rule for judgment was being perfected, that the court could interfere, if the bail were subsequently put in. (*Jackson a. Schaubert*, 7 *Cow.*, 417.) The Revised Statutes directed a stay, if the execution were not fully executed; and the court refused to order

the sheriff to proceed after bail was put in, but they did not vacate the levy. (*Delafield v. Sandford*, 3 *Hill*, 473.)

The decision of the general term of this district, in *the matter of Berry* (26 *Barb.*, 55), settles the question in this court. It is there held that the security and appeal only stay further proceedings. They do not undo any thing already done. They only stay an execution if it have not issued, so that if the execution were issued, and a levy made, the sale was stayed, but the levy was not interfered with. The rule as laid down in these cases may be a hard one to a debtor who has given ample security, but I have no authority to change it.

Motion denied.

SUPREME COURT.

COOK v. STAATS.

(18 *Barb.*, 407. *Decided* 1854.)

The *venue* is an essential part of an affidavit; and is *prima facie* evidence of the place where the affidavit was taken.

An affidavit without a *venue* is a nullity, although sworn to before an officer whose residence is mentioned in the jurat.

E. P. Chapin, for the plaintiff in error.

H. Seymour, for the defendant in error.

By the Court, MARVIN, P. J. In August, 1853, Mrs. Staats, the landlord, made an affidavit for the purpose of commencing proceedings to remove Cook, her tenant, upon the ground that he held over without permission after rent was due and unpaid. In her affidavit the words *with* permission were used, instead of *without* permission. The summons issued by the justice was in proper form, reciting that Mrs. Staats had made oath that Cook continued in possession *without* the permission of the landlord, &c. Cook was removed. In December, 1853, Cook made application for a *certiorari*, which was granted, upon an affidavit made by him. In this affidavit there

was no *venue*. The jurat was, "Sworn before me, this 7th day of Nov. 1853, Geo. B. Ketchum, Com'r of Deeds for the city of Buffalo." The affidavit was signed by Cook with his cross; his name being written by some other person. It is now objected by the defendant in error that the affidavit was insufficient, as it contains no *venue*, and also because it does not appear in the jurat that the affidavit was read to Cook, or its contents explained, as should have been done; he being an illiterate person, &c.

The error, in using the word *with* instead of *without*, in the affidavit of Mrs. Staats, was, I have no doubt, a mere clerical error; but I am not prepared to say that we should disregard it, or that we could treat the affidavit as sufficient. It does not appear that Cook has been prejudiced by the error, or that he took the objection. The *certiorari* was not applied for until about four months after the proceedings before the justice. Under the circumstances I think that Cook's proceedings should be strictly correct. And in my opinion the affidavit upon which the *certiorari* was granted is not sufficient. Affidavits should, by the universal practice, contain a *venue*; and it is said to be an essential part of an affidavit. (1 *Barb. Ch. Prac.* 601. 6 *How. Pr. Rep.* 394.) It is important that it should indicate the county in which it was taken, in reference to a prosecution for perjury; and the *venue* in an affidavit is *prima facie* evidence of the place where it was taken. An affidavit with one county as a *venue*, sworn to before an officer in another county, having authority to take affidavits in his county, cannot be read. (See 2 *How. Pr. Rep.* 86, 127, 181.) And see 6 *How. Pr. Rep.* 394, where it was held that an affidavit without a *venue*, taken before a commissioner of deeds, whose residence is not mentioned, is a nullity. In the present case, the commissioner states that he is commissioner of deeds of the city of Buffalo; but this does not obviate the difficulty.

I think the *certiorari* should be quashed or superseded.

Ordered accordingly.

SUPREME COURT.

VAN LOAN v. KLINE.

(10 *John.*, 129. *Decided* 1813.)

An attachment issued by a justice, under the act, (Sess. 31, c. 204, s. 21 [2 Rev. Stat. 230,]), at the instance of a *bona fide* creditor, and in a case warranted by law, creates a *lien* upon the goods attached, not only against the acts of the debtor himself, but against a subsequent attachment or execution of any other creditor; but the *lien* will be lost if the creditor does not prosecute his suit to judgment with all due diligence.

THIS was an action of trover. At the trial, the plaintiff proved his property in the goods, and a demand and refusal of them. It was admitted that on the 8th October, 1811, a judgment was entered up and docketed, by virtue of a warrant of attorney, on a bond, against one Eaton, at the suit of T. Croswell; on which judgment a *fi. fa.* was issued, tested the 18th August, 1811, which was delivered to the plaintiff as sheriff of the county of Greene, on the 11th October, 1811. It was proved that the plaintiff on the day he received the execution, went to the house of Eaton, and found the property in question locked up in a room, the key of which was in possession of a constable, who had attached the goods of Eaton, prior to the delivery of the execution to the plaintiff, by virtue of an attachment issued pursuant to an act of 1808 (Sess. 31, c. 204, s. 21, [2 Rev. Stat. 230,]) by a justice; and that judgment was entered up on the attachment, the 6th October, 1811; and the property was sold by the constable on execution, subsequent to the delivery of the *fi. fa.* to the sheriff, who forbade the sale by the constable, and claimed the property under the execution held by him. It appeared that the property was sold by the constable as well on the execution issued on the judgment on the attachment, as under other executions in his hands, being more than thirty; and the defendant purchased the property in question under such sale by the constable.

* * * * *

Per Curiam. The attachment issued under the act of 1808 (Sess. 31, c. 204, 2 Rev. Stat. 230), and was duly served not only before the execution under which the plaintiff acted, but prior to

the judgment on which it issued. The act directs the constable serving the attachment, to *take and safely keep* the goods, to *satisfy* such judgment as may be rendered in favor of the creditor, and to remove the goods, on receiving security, that they *shall be produced to satisfy any execution* which may be issued on such judgment. The service of the attachment seems, then, to place the goods in the custody of the law, or, at least, to create a valid lien which the subsequent execution in another suit cannot remove. If the attachment has not this effect, what is to become of the security which the constable is to take? and shall the bond be deemed forfeited when the law permits an execution in another case, and without any pretension to priority, to seize and appropriate the goods? If the service of the attachment be not a lien, the proceeding is useless, for it may, at any time, be defeated by the debtor, by confession of judgment to another creditor; and it would be the greatest injustice to enforce the forfeiture of the bond when the law permits the property to be seized in the hands of the security. The test of the execution, though prior to the attachment, cannot make that process overreach and defeat the attachment by relation; for a fiction cannot take away a vested right. Nor can the public suffer any inconvenience from the binding effect of the attachment; for the attachment is to be returned to the justice as speedily as a summons, and the justice is then to proceed immediately in the cause, in like manner as if a summons had been personally served on the defendant.

It accordingly appears to us to be the true construction of the act, that the attachment, if issued at the instance of a *bona fide* creditor, and in a case warranted by law, creates a lien upon the goods, not only against the acts of the debtor himself, but against the subsequent attachment or the subsequent execution of any other creditor. This lien is no doubt temporary, and will expire if the creditor does not prosecute his suit to judgment and execution with all due diligence. In Connecticut, an attachment cannot hold the property for more than sixty days after the judgment. *Buel v. Metcalf, Kirby*, 40.

Judgment for the defendant.

SUPREME COURT.

OTIS v. JONES.

(21 *Wend.*, 394. *Decided* 1839.)

Where a suit was commenced by attachment and property seized, and afterwards the suit was discontinued but the property retained by the plaintiff, it was held to be a conversion and a right of action in tort by the owner of the property was complete and a recovery could be had for the full value of the property seized, notwithstanding it had been levied upon and sold by virtue of a valid judgment and execution.

A tender is not a bar for a tort, nor will it take away the right of action for full compensation in damages; under the legal sale, the defendant stands in no better position than if he had offered to restore the property.

A. C. Hand, for the plaintiff.

G. A. Simmons, for the defendant.

By the Court, BRONSON, J. Assuming that the first and second attachments were both regular, still the sale of the horses in June, on an execution in favor of Jones, when there was no judgment to support the execution, was clearly wrongful, and a conversion of the property. *Reynolds v. Shuler*, 5 *Cowen*, 323. And besides, Jones was himself the purchaser at the sale, and held the horses about three months under this void title. It is impossible to deny that there was a conversion. Indeed it was so ruled at the circuit.

But the judge held that the second sale, which took place in September, and on the execution in favor of Farnum, was legal; that the effect of the sale was in mitigation of damages, and that the plaintiff was only entitled to a verdict for the nominal sum of six cents.

Assuming what we do not intend to decide, that the justice had in this case the power to amend his docket and issue a new execution, and that the second sale was consequently legal, still I think the plaintiff has a right to complain of the rule of damages. He had been wrongfully deprived of his property in June — his right of action was then complete, and had the suit been brought at any time within the three months which elapsed before the second sale, it is admitted that he would have been entitled to recover

the full value of the property. How has he lost that right? The statute of limitations has not run, nor has the plaintiff done any act whatever to bar or prejudice his claim. How then has he lost everything but the mere form of a remedy? The argument is, that by the second sale, on legal process, the property has in effect been applied to the plaintiff's use, and therefore he ought only to recover nominal damages. The answer is, that a wrong-doer cannot discharge himself by any act of his own, without the assent of the injured party.

But suppose there was no tort in the case, and the question arose in an action of assumpsit. Although by means of the second sale the sum of \$36, for which the property was struck off, may have been applied to the plaintiff's use, by way of satisfying so much of his debt, yet as that benefit was conferred without request, it would create no legal obligation on the part of the plaintiff to refund, or in any other way account for the money. *Bartholomew v. Jackson*, 20 *Johns. R.* 28. If the defendant could not in an action recover the value of a benefit thus conferred on the plaintiff, he cannot do the same thing in another form, as by setting it off or using it by way of satisfaction in an action brought against him by the plaintiff. If this could not be done in assumpsit, it surely cannot be allowed in an action of trover.

By procuring a sale on legal process, the defendant cannot be better off than he would be if he had offered to restore the property to the plaintiff. And yet no tender will, at the common law, either bar an action for a tort, or take away the right to full compensation in damages. The case of *Hayward v. Seaward*, 1 *Moore & Scott*, 459, does not proceed on the ground that a tort can be cured by a tender without acceptance, but on the ground that there had been no conversion of the property. In the case of *Hanmer v. Wilsey*, 17 *Wend.* 91, we had occasion to consider the effect, both of an offer to restore property which had been wrongfully taken, and of a subsequent sale of the property on legal process against the owner. We came to the conclusion that neither the tender nor the subsequent sale could in any way affect the remedy of the party whose property had been tortiously taken. It is true, that the owner in that case had commenced an action for the injury before either the tender or the sale was made. But that cannot alter the principle. We think the case of *Hanmer v. Wilsey*, was

rightly determined, and that it is decisive of the point under consideration.

Had there been a sale before suit brought, on legal process against the plaintiff in favor of some person other than the wrongdoer, that would have presented a question which we are not now called upon to decide. *Irish v. Cloyes*, 8 *Vermont R.* 30. In this case although Farnum was the nominal plaintiff in the second execution, the defendant Jones was the real party. He owned the debt, and procured the rendition of the judgment on which the execution issued.

New trial granted.

SUPREME COURT.

BARNARD AND OTHERS *v.* VIELE AND ANOTHER.

(21 *Wend.*, 88. *Decided* 1839.)

M. T. Reynolds, for the defendants.

S. Stevens, for the plaintiffs.

By the Court, NELSON, Ch. J. The demurer is well taken. The statutes prescribe the terms of the condition of the bail bond, and it must be complied with. It differs from the old statute, 1 R. L. 423, § 13. Although the terms prescribed in the *new*, were before, according to the practice of the court, necessarily to be complied with in performing the condition of the *old* bond, and therefore the old and new conditions would seem to be in legal effect the same, still the terms are now, by the statute, to be expressed in the condition. The legislature may have thought this useful, as advising the parties distinctly what is essential to performance—an idea suggested by the revisers, and which doubtless led to the change.

We may regret the departure from a form and usage which had so long been in existence, for the attainment of so unimportant an

object, but this affords no ground for disregarding a positive enactment. Besides, another section of the revised statutes, 2 R. S. 286, § 59, is very explicit, that no sheriff or other officer shall take any bond, &c. by color of his office, or in any other manner than such as are provided by law; and if he does, it is declared that the bond shall be void.

Judgment for defendants.

SUPREME COURT.

COLVIN *v.* MORGAN.

(1 *Johns. Cases*, 415. *Decided* 1800.)

A member of assembly is not entitled to his privilege after he has reached home though within the fourteen days.

THE defendant in this cause moved to be discharged from the arrest, on the ground that, being a member of the assembly, he was arrested within fourteen days after leaving the legislature; but he did not state whether he had reached his home or not, at the time of the arrest.

Per Curiam. If the defendant arrived at his home within the fourteen days, and before the arrest, the reason of his privilege, and, of course, the privilege itself ceased. (Rev. Laws of N. Y. vol. 1, p. 133.) As the defendant does not state where he was at the time he was arrested, the motion must be denied, with costs.

Rule refused.

SUPERIOR COURT, NEW YORK.

JOHN KUHLMAN v. JOHN ORSER, Sheriff.

(5 *Duer*, 242. *Decided* 1856.)

The responsibility of a sheriff is the same in acting under an attachment, as in acting under an execution.

By the Court, DUE, J. * * * * *
* * * * *

No one can doubt, that the sheriff, in proceeding under an attachment, acts just as certainly at his own peril, in applying the process to the property described, as in proceeding under a final execution. When he seizes and removes the property of A., under an execution against B., he is liable as a trespasser. He is just as liable, when he commits the same mistake and wrong in acting under an attachment, and it is this mistake and wrong that the defendant appears to have committed, through his deputies, in the case before us.

* * * * *

SUPREME COURT.

GLOVER v. WHITTENHALL.

(6 *Hill*, 597. *Decided* 1844.)

An officer has no right to break the outer door of a man's dwelling house for the purpose of serving civil process *in the first instance*, whether the process be against his person or property *Per Bronson, J.*

But where the execution of the process *has been properly commenced*, the officer may afterwards break the outer door, if necessary, for the purpose of continuing and completing the performance of his duty.

After a levy upon goods in a dwelling house by virtue of a *fi. fa.* against the owner, the officer went away before completing his inventory. He returned the next day in order to resume his control over the goods, but was refused admittance; whereupon he forced an entrance through one of the outer doors. *Held*, that the entry was lawful.

Held further, that though the defendant in the *fi. fa.*, intermediate the levy and the forcible entry, served the officer with a judge's order staying *all proceedings*

upon the writ, preparatory to a motion for setting it aside, this only operated to suspend the power of sale, but did not affect the officer's right to enter for the purpose mentioned.

* * * * *

TRESPASS *quare domum fregit*, tried before Monell, C. Judge, at the Chenango circuit in January, 1843. The case was this: The defendant was a deputy sheriff, and had a *feri facias* against the plaintiff at the suit of one Carley, for \$1,709.83. In the evening of the 25th of December, 1840, after having that day levied upon some property on the farm, the defendant entered the plaintiff's dwelling house, with permission, and then, as he attempted to prove on the trial, made a levy upon the goods in the house, and the same evening, after he left the house, commenced making an inventory thereof. As to whether there was a levy upon the goods in the house on the 25th of December, the evidence was conflicting. On the morning of the 26th of December, the plaintiff procured and served upon the defendant a judge's order to stay all proceedings on the execution until the next special term, with a view to a motion to set aside the execution, of which due notice was given. After the service of the order, and after being advised by counsel that he had a right so to do, the defendant went to the plaintiff's house for the purpose of completing the levy upon the goods in the house, and making a full inventory of the same. On his way to the house, he was forbidden by the plaintiff to enter it; but the defendant proceeded, and finding the outer doors of the house fastened, he demanded admittance, which was refused by the plaintiff's wife. The defendant thereupon forced open one of the outer doors, entered, and completed a levy upon, and made a full inventory of, the goods in the house. For this entry the action was brought. The judge charged the jury, in substance, that assuming there was a levy upon the goods in the house on the 25th of December, still the defendant was a trespasser for the forcible entry on the 26th to complete the inventory. The jury found a verdict for the plaintiff, with fifty-one dollars damages; and the defendant now moved for a new trial on a case.

H. Vanderlyn, for the defendant.

James Clapp, for the plaintiff.

By the Court, BRONSON, J. It is not improbable that the jury would have found there was no levy upon the goods in the house on the twenty-fifth of December, if the cause had been made to turn on that question. But as the judge assumed that there was a levy on that day, and ruled against the defendant on another ground, we cannot avoid passing upon the questions of law which are presented by the charge. And I take the rule to be, that for the purpose of serving civil process *in the first instance*, whether against the person or the goods of the defendant in the process, the officer cannot justify the breaking of the outward door of the defendant's dwelling-house. But *where the execution of the process has been properly commenced*, the officer may afterwards break the outward door, if necessary, for the purpose of continuing and completing the execution. This distinction is fully sustained by the authorities cited at the bar ; to which others might be added if it were necessary. If the defendant, after an arrest, escape and take shelter in his dwelling house, the officer may pursue, and if he cannot otherwise gain admission, may break the house for the purpose of making recaption. And the principle is the same where the officer has made a levy upon goods. If the defendant has afterwards shut them up in his dwelling, and the officer cannot gain admittance upon a reasonable demand, he may force the doors for the purpose of regaining his possession and legal control over the property. A different rule would put the officer in a most perilous condition. By the original levy, he makes himself answerable to the creditor for the goods, or for so much of them as will be sufficient to satisfy the debt ; and if his control over the property is made to depend on the will of the debtor, it is easy to see that the goods may be wasted or destroyed, and yet the officer be charged with the payment of the debt. When a levy has been duly made, the property is in the custody of the law, and the officer may do whatever is necessary for the purpose of maintaining his legal control over it.

As the officer did not remove the goods, the case has been likened to the suffering of a voluntary escape after an arrest upon process against the body. But it is not unusual in this state, after a levy upon goods, to leave them in the possession of the debtor, either with or without a receiptor. It is an act of kindness toward the debtor, which, although it may render the officer answerable to the creditor, or involve him in difficulty with third persons,

does not amount to the abandonment of the levy so far as the debtor himself is concerned. As to him, the property is still in the custody of the law, and the officer may come again at pleasure to complete the execution of the process.

The only remaining question arises upon the judge's order. Although the terms were, that "all proceedings" upon the execution should be stayed, in legal effect it only stayed a sale of the goods until the motion should be disposed of. If there had been no prior levy, the order might have prevented the making of one. But here there had been a prior levy. The officer had already become answerable to the creditor for the safe keeping of the goods; and it would be a most unreasonable construction of the order to say, that it tied the sheriff's hands so that he could not take care of the property until it should be decided whether he was to sell or not. It would put it in the power of the debtor to waste or dispose of the goods, leaving the sheriff answerable to the creditor for their value. These orders made in general terms must be construed with reference to the object for which they were granted; otherwise great injustice will be done. It is not unusual to see an order that all proceedings on the part of the plaintiff, without any qualification, be stayed until the defendant can make some motion. Should such an order be taken literally, it would prevent the plaintiff from preparing papers, or employing counsel to oppose the motion. In the case at bar, the judge could have intended no more than to stay a sale on the execution until the defendant should be heard on his motion to set aside the process; and the sheriff might well re-enter the house for the purpose of completing the inventory, and doing whatever else might be necessary for the safe keeping of the goods until the motion should be determined.

New trial granted.

SUPREME COURT.

RANDALL v. CRANDALL.

(6 *Hill*, 342. *Decided* 1844.)

Though a justice's warrant be served while a defendant is attending court as a suitor upon other process, he must avail himself of his privilege from arrest before pleading in bar; for such plea admits that he is properly in court.

* * * * *

R. Judson, for the plaintiff in error.

A. L. Pritchard, for the defendant in error.

By the Court, BRONSON, J. If a justice of the peace can discharge, on motion, a defendant who has been arrested while temporarily privileged, which is very questionable (*see Shannon v. Comstock*, 21 *Wend.*, 457), still the motion here came too late. By pleading in bar, the defendant admitted, for all the purposes of the action, that he was properly in court. (*See Malone v. Clark*, 2 *Hill* 657.) The motion should have been made before pleading. The defendant complains that he was without counsel when arrested and taken before the justice, and did not know how to claim his legal rights. But his ignorance of the law cannot avail. He should have pleaded his privilege in abatement, or moved for a discharge, instead of pleading in bar of the action.

* * * * *

SUPREME COURT.

WARNER AND OTHERS v. RACEY.

(20 John., 73. Decided 1822.)

The bond taken from a constable, with sureties, under the act (2 N. R. L., 126, sess. 36, ch. 35), should be made to the *people of the State of New York*.

Though a constable neglects to return an execution for above *thirty days*, it is no breach of the condition of a bond taken pursuant to the statute, unless money has come to his hands, on account of such execution, which he has neglected or refused to pay over.

In error on *certiorari* to a justice's court.

Racey sued the plaintiffs in error before a justice, on a bond given by Warner, as constable, and M'Kenney and Sturges, the other plaintiffs in error, as his sureties. The defendants below pleaded the general issue. On the trial, the plaintiff below proved that an execution had been delivered to Warner, as constable, which he had neglected to return, for upwards of thirty days. He then proved the execution of the bond by all the defendants below, "to the people of Niagara county," conditioned for the payment of "all sums of money which shall come into the said Warner's hands for collection by way of execution." The bond, as directed to be taken by the statute (2 N. R. L. 126, sess. 36, ch. 35), is, "to pay to each and every person such sum of money as the said constable shall become liable to pay, for or on account of any execution which shall be delivered to such constable for collection." It was proved that, in fact, no money was collected on the execution; but that the constable took the body of the debtor, &c. But the jury found a verdict for the plaintiff below, on which the justice gave judgment.

Per Curiam. The bond is not according to the statute; and, if it were, there is no evidence of any breach, *for no money has come to the hands of the constable, &c.* Though the statute is silent in that particular, yet we think the bond should be made to the *people of the State of New York*. The judgment must be reversed.

Judgment reversed.

SUPREME COURT.

WHEELER v. NEW YORK AND HARLEM R. R. CO.

(24 Barb., 414. Decided 1857.)

The return of a constable, certifying the time and manner of his serving a summons upon the defendant, is presumptive evidence of what it states. If it appears from that return that the process has been regularly served, and nothing is shown, or offered to be shown to the contrary, the justice is authorized to proceed in the action; and his judgment, if otherwise regular, cannot be controverted in the same, or a collateral suit.

Where the statute designates one or more officers of a corporation upon whom process against it may be served, the return of the constable is, in like manner, evidence as to the official character of the person served with such process, and of the facts which justify such service.

If the defendant appears in season he can raise and avail himself of the objection that the primary process had not been served upon him in such a manner as to confer jurisdiction upon the magistrate.

R. G. Dorr, for the appellants.

S. Wodell, for the respondent.

S. B. STRONG, J. The return of a constable certifying the time and manner of his serving a summons upon the defendant, is undoubtedly presumptive evidence of what it states. If it appears from that return that the process has been regularly served, and nothing is shown or offered to be shown to the contrary, the justice is authorized to proceed in the action, and his judgment, if otherwise regular, cannot be controverted in the same or a collateral suit. When the statute designates one or more officers of a corporation upon whom process against it may be served, I am inclined to think that the return of the constable is in like manner evidence as to the official character of the person served with such process, and of the facts which justify such service. This principle seems to be necessary in the administration of justice, as the magistrate could not otherwise be protected when the officer should make a false return in a jurisdictional particular. But it seems to me that the reason (the inability to obtain information upon the subject of the return) is inapplicable when the defendant appears in season and offers to prove that the process has not

been legally or at all served upon him. Then the justice is, or may be apprised, at once, that he ought not to entertain jurisdiction over the defendants; for, in truth, no action should (or, but for the reason which I have mentioned, could in any case) be sustained against one who had received no legal notice of its institution or pendency. I am not aware of any case where it has been decided that a defendant who appeared in season could not raise and avail himself of the objection that the primary process had not been served in such a manner as to confer jurisdiction upon the magistrate. In this case I think that the defendant should have been permitted to show that the service upon the freight agent of the company was unauthorized by the statute, as there was a resident director in the county.

The declarations of the engineer, at a time subsequent to the accident, were not legitimate evidence against the company, and should not have been received. True, they had no bearing upon the only point in controversy—the sufficiency of the service—but they had a tendency to show negligence, and may have misled the jury. Indeed it is probable that such evidence induced the jury to decide the action upon a point foreign to the case, as the weight of evidence upon the point actually involved was in favor of the defendant.

The judgment of the justice and of the county court, should be reversed.

EMOTT, J., concurred.

BIRDSEYE, J. The statute respecting the commencement of suits in justice's courts (2 R. S. 228, § 13-16), and the summons issued in pursuance thereof, make it the legal duty of the constable to serve the process, in a certain manner, and to return, thereon, in writing, the time and manner in which he executed the same. Upon a familiar principle, whatever he does and certifies in the performance of this official duty is evidence, and, as between parties to the process, or privies, conclusive evidence, and not liable to collateral impeachment. (*Cowen & Hill's Notes to Phil. Ev.* 1047, 8, 1083, 5, 7.) But it is nowhere made the duty of a constable, receiving for service a summons against a railroad corporation, to ascertain or to certify whether there be any director or

other officer of the corporation on whom process can be served according to the existing provisions of law, resident in his county, or whether the corporation has failed to designate some person on whom such process can be served, and to file such designation in the office of the county clerk. (See Laws of 1854, 613, 614, § 14, 15.) Of what effect the constable's certificate or return on either of these points can be, I do not perceive. As to the latter, for instance, the county clerk is the proper person to certify. If the constable has any knowledge or information in regard to it, he must obtain the same from the clerk. If he obtain it orally, how can we know that he correctly understood, or remembered, or certified the statements made to him. If he obtained the written certificate of the clerk (which would undoubtedly be good evidence of the designation, or of the failure to file it, 2 R. S. 552, § 12), why should not the court have the same evidence. Upon what principle, or by what authority, may he suppress it, and give his own certificate of that fact, and without even referring to the certificate of the clerk? The same remarks apply to the alleged non-residence of any officer on whom process can be served, according to the existing provisions of law. Perhaps a constable who is personally acquainted with every resident of his county, or who personally knows all the officers of a railroad, as well as the fact that each of them resides in some specific place out of his county, may truly make the return or certificate made by the constable in this case. But it cannot be presumed that any constable, much less that *every* one, would possess this knowledge. No constable is bound to obtain such knowledge. And if he certifies to it, I know not how his return can become even *prima facie* evidence of the matters he states.

As then the justice of the peace could obtain jurisdiction of the action by such a service on the freight agent of the defendants as was made in this case, only in case of the non-residence in Dutchess county, of some one of the superior officers of the company, on whom, by law, process could be served, and then only by the failure of the company to designate some other person in the county on whom such process could be served; and as there was no legal evidence before the justice, upon either point, I do not see that he obtained any jurisdiction of the action whatever, or had any power to adjourn from the 25th to the 31st of July.

When the defendants appeared upon such adjourned day, and took the objection that one of the directors of the defendants did not reside in the county, and made proof of that fact, and moved to dismiss the summons and the suit, the justice denied the motion, insisted that he had acquired full jurisdiction of the action, and proceeded to hear it and give judgment. In so doing he must have proceeded on the ground that the return of the constable, stating the facts which alone conferred jurisdiction, was not only evidence, but conclusive evidence of those facts. I think he was in error in holding the return conclusive. As I have already said, I do not think it was even *prima facie* evidence. It was, so far as these facts are concerned, an unofficial statement, and therefore merely *hearsay*. (See *Williams v. Merle*, 11 Wend. 80, 82.)

When this objection, properly taken, and sufficiently supported, had been overruled, the defendants answered and went to trial on the merits. This was no waiver of their objection to the jurisdiction. (14 *John*. 481. 4 *Barb*. 320, 545. 9 *id*. 60. 11 *id*. 309.)

I entertain no doubt that the evidence of the declarations of the engineer, made subsequent to the time when the plaintiff's cattle were injured, in regard to the defectiveness of the light on the engine, at the time of the supposed accident, was improperly admitted. He was a competent witness for either party. His declarations were clearly not a part of the *res gestæ*. It is only where the agent's declarations are so, that they are evidence against his principal. (4 Wend. 394.)

Without examining the other questions in the case, I am of opinion that the judgments of the county court and the justice must be reversed.

Judgments reversed.

SUPREME COURT.

WATERS v. WHITEMORE.

(22 Barb., 593. Decided 1855.)

An action brought in a justice's court, against an attorney, to recover back money which it is claimed that he has taken from the plaintiff, by charging illegal fees in bills of costs collected of him, is not to be regarded as an action of assumpsit based upon an implied promise.

It therefore is not an action for money due upon a contract, express or implied, within the meaning of the first section of the act of April 26th, 1831, and consequently the provision of the act abolishing imprisonment for debt arising upon contract does not apply to the case, and a justice of the peace has no jurisdiction to issue a short summons, against a defendant residing out of the county.

But if such an action were to be regarded as based upon an implied promise, it is exempted from the operation of the provisions of the act of April 26th, 1831, allowing a short summons by the 2d and 30th sections of that act, on the ground that an attorney is a *public officer*, and that it is official misconduct in him to charge and receive more fees for any service than the statute allows.

A short summons cannot be issued, in any case, against a defendant who is a non-resident of the county, except when the plaintiff's demand arises on contract, express or implied.

THIS action was commenced before a justice of Chenango county, against the defendant, who was a resident of Madison county, to recover back the sum of about forty dollars which it was claimed that the defendant, who was an attorney, had taken from the plaintiff, by charging illegal fees, in certain bills of costs which he had collected of the plaintiff. The gravamen of the complaint was in tort. The defendant on the return day of the summons, raised the objection to the process that a short summons could not issue in such a case, and asked to have the suit dismissed for that cause. This was refused, and the plaintiff recovered a judgment for the amount claimed, in the justice's court, which was affirmed, on appeal, by the county court. From the judgment of the county court the defendant appealed to this court.

B. F. Rexford, for the plaintiff.

J. P. Whittemore, defendant in person.

MASON, J. The 5th section of title 4, of art. 3d, of part 3d, of ch. 10th of the Revised Statutes, prohibits an attorney from receiving any other or greater fee or reward for any service than shall be allowed by law; and the 7th section of the same title makes the receiving of such fees a misdemeanor, and subjects the person guilty thereof to treble damages. (2 R. S. 651, § 7.)

I am of opinion, after a careful examination of the pleadings in this case, that it is not to be regarded as an action of assumpsit based upon an implied promise; and if so, then certainly it is not an action for money due upon a contract, express or implied, within the meaning of the first section of the act of April 26, 1831, and consequently the provision of the act abolishing imprisonment for debt arising upon contract does not apply to the case, and therefore the justice had no jurisdiction to issue a short summons. But if we hold it to be an action based upon an implied promise, then I am of opinion that the case is excepted from the provisions of the act of April 26, 1831, allowing a short summons. Sections 2 and 30 of that act seem very clearly to except this case. The 2d section excepts from the provisions of the act non-residents of the state, etc.; and also actions for fines or penalties, or on promises to marry, or for moneys collected by any public officer, or for any neglect or misconduct in officers or in any professional employment; and the 30th section provides that no execution against the body shall be issued by any justice of the peace, upon a judgment rendered by him, for the recovering of money collected by a public officer, or for official misconduct or neglect of duty, or damages for misconduct or neglect in any professional employment. (*Laws of 1831, p. 403, § 30.*) And the 31st section prohibits any warrant from being issued in any case where, by the provisions of the 30th section, an execution cannot go against the body. Then comes § 33, under which the summons in this case was issued, which reads as follows: "Whenever by the provisions of the 30th section no warrant can issue, and the defendant shall reside out of the county, he shall be proceeded against by summons or attachment, returnable not less than two nor more than four days from the date thereof," etc. (*Laws of 1831, p. 403, § 33.*) It will be seen, therefore, that the short summons cannot be issued in any case where a warrant could go under the 30th section of the act. Now it should be borne in mind that attorneys and

solicitors are public officers. Lord Hardwicke said in the case of *Walmsley v. Booth* (*Barn. Ch. R.* 478), that attorneys and solicitors are to be considered as public officers; and the same is said by Chancellor Walworth in the case of *Merritt v. Lambert* (10 Paige, 356). The same was held in the court of dernier resort in this state in the case of *Wallis v. Loubar* (2 Denio, 607). Now it is misconduct in an attorney to charge and receive more fees for any service rendered than the statute allows; especially when the statute makes such an act an indictable offense, as we have seen it does, and the attorney must be regarded as receiving his fees officially, as much so as a sheriff or any other officer. And if so, then the act of an attorney, in receiving illegal fees, is one of official misconduct; and I apprehend that it is because attorneys and solicitors are regarded as officers of the court, that our courts have been in the habit of granting relief against them by summary motion, treating the act as one of official misconduct in an officer of the court, and therefore to be redressed in a summary manner.

But again, it should be borne in mind that prior to the act of April 26, 1831, the summons could never go against a non-resident of the county. It was expressly provided by the 13th section (2 R. S. 227), that no person shall be proceeded against by summons out of the county in which he resides, and by the 17th section of the same act the warrant is given. This statute remains in full force except as the same may be affected by the 30th, 31st, and 33d sections of the non-imprisonment act above referred to, and these provisions only apply to demands arising on contract, express or implied. The short summons, therefore, cannot go in any case against a defendant who is a non-resident of the county, except when the plaintiff's demand arises on contract, express or implied, and not when it arises on contract in the class of cases above stated. And if I am right in the construction which I have put upon this complaint, that it does not purport to be upon a demand arising on contract, then the short summons could not go in this case against the defendant were he not an attorney of the court. It follows, therefore, that the defendant's second objection before the justice was well taken, and the judgment of the county court and that of the justice must be reversed.

GRAY, J., and SHANKLAND, J., concurred.

CRIPPEN, J., voted for reversal, on the grounds and for the reasons in his opinion as reported in 13 *Barb.*, 634.

Judgment reversed.

SUPREME COURT.

CADWELL v. COLGATE AND OTHERS.

(7 *Barb.*, 253. *Decided* 1849.)

Where an attachment was issued against a non-resident debtor, on affidavits which were insufficient to confer jurisdiction on the officer issuing it, and after a levy made by the sheriff on the property of the debtor, the latter procured its release by executing and delivering a bond with sureties, reciting the issuing of the attachment, and conditioned as required by statute, for the payment of the debt, with interest, costs, &c. the bond was adjudged to be void.

Where a suit is brought on such bond by the creditor against the debtor and his sureties, the defendants are not estopped from setting up the invalidity of such bond and availing themselves of the ground that the proceedings under which the property was seized, were void.

DEMURRER. The declaration was on a bond taken under sections 57 and 58, 2 *R. S. 3d Ed. p. 72*. The first count set forth a proceeding in favor of the plaintiff, a resident of this state, against William Woodworth as a non-resident debtor, by attachment issued on the 25th of August, 1846, by Frederick P. Stevens, Esq., first judge of Erie county, counsellor, &c. The substance of the application was set forth in due form, and the further averment that there was attached to said application an affidavit sworn to before said first judge on the day last aforesaid, in which it was set forth that said plaintiff then had a demand against the said Woodworth personally, arising upon contract made in the State of Indiana, amounting to \$100 and upwards, and that the said Woodworth was then indebted to the said plaintiff in the sum of \$2267.22 over and above all discounts, and that the said Woodworth was not then a resident of this State, but that he then resided at Lafayette in the State of Indiana, or elsewhere out of the State of New York.

And it was further set forth in the declaration that there was

annexed to said application another affidavit sworn to on the day last aforesaid, before the said first judge, by John C. Hayward, and Solomon Drullard respectively, who were the persons of that name mentioned in the application, in and by which affidavit last mentioned each of said persons last named stated and swore *that said Woodworth then resided at Lafayette in the State of Indiana, or elsewhere out of the State of New York, as each of said persons verily believed to be true*, and that neither said Hayward nor said Drullard were interested in said application. The declaration further averred the issuing of the warrant of attachment, and that on the same day of the delivery thereof to the sheriff of the county of Erie to be executed, Woodworth applied to said judge for an order to discharge the warrant, and that for the purpose of procuring such discharge the bond sued on was made by the defendants in this suit, and duly acknowledged and delivered to said judge, who approved the same, and thereupon made his order discharging the attachment.

The bond was in the penal sum of \$4415.44, recited the proceedings before the judge, and was subject to a condition to pay Cadwell the amount justly due and owing to him at the time he became an attaching creditor on account of any debt claimed and sworn to by said Cadwell, with interest, costs, &c.

The declaration then averred the indebtedness from Woodworth to Cadwell. To the first count of the declaration the defendant demurred; and the plaintiff joined in demurrer. To the second count there were pleas presenting the same facts as were set forth in the first count, and a demurrer to the plea, and joinder.

A. Taber, for the defendant.

N. Hill, Jr., for the plaintiff.

By the Court, PARKER, J. The defendants contend that an action cannot be maintained on the bond given to procure the release of the goods from the attachment, on the grounds that the proceedings were void, for the want of a proper affidavit to authorize the issuing of the attachment. The witnesses stated in their affidavit, that the said Woodworth then resided at Lafayette in the State of Indiana, or elsewhere out of the State of New York,

as each of said persons verily believed to be true, &c. This was clearly insufficient to give jurisdiction. The statute requires that *the facts and circumstances* to establish the grounds on which the application is made shall be verified by the affidavit of two disinterested witnesses. (2 R. S. 3d ed. 64, § 5.) Here no fact or circumstance was stated; and it is no proof whatever for a witness to state his *belief* of a fact. A man may be able to swear to his belief, when he has no personal knowledge of the facts necessary to be established. Such testimony is never received in a court of justice. In *ex parte Haynes* (18 Wend., 611), the witnesses stated in their affidavit that *they were informed and believed* that the debtor was a non-resident, and the attachment was set aside for the want of jurisdiction. The case now under consideration is still more defective, as the witnesses do not even state their *information* on the subject. On this point the law is well settled. (*Smith v. Luce*, 14 Wend., 637. *Ex parte Robinson*, 21 Id. 672. *Kingsland v. Corwin*, 5 Hill, 611. *In the matter of Bliss*, 7 Id. 187. *Thatcher v. Powell*, 6 Wheaton, 119. *Williamson v. Doe*, 7 Blackf. 12. *Matter of Faulkner*, 4 Hill, 598.)

But it is said that although the attachment was void, the *bond* is valid. After the issuing of the attachment the party proceeded against applied to the judge for an order to discharge the warrant, which was granted on executing the bond in suit, which was duly acknowledged and approved. Under such circumstances does the bond fall with the other proceedings? The plaintiff contends that the defendants are estopped from denying the issuing of a valid attachment, because it was recited in the bond that an attachment was issued. *Love v. Kidwell* (4 Blackf. R. 553.), cited by the plaintiff's counsel, was on an attachment bond. The declaration set out the condition of the bond, which after reciting that Kidwell, one of the defendants, had issued a writ of foreign attachment against the plaintiff stipulated that if Kidwell should prosecute his said writ, &c., against Love to final judgment, and pay all damages that might be sustained by him, provided the proceedings should be wrongful and oppressive, then the bond to be void. One of the pleas interposed was that no writ of attachment ever issued; to which the plaintiff demurred. The court said "The plea, that no writ of attachment was ever sued out, is bad, because it denies a fact which is admitted to have existed by

the condition of the bond, which is set out in the declaration. The plaintiff had a right to avail himself of the estoppel by the demurrer. It is not necessary to reply to that matter, when it appears by the previous pleading."

In that case, it will be observed, the bond was given by the party suing out the attachment, and he would have no right to question its validity. If it had been void, he would have been liable on the bond for the injury done in suing out void process. There, the bond was for the protection of the person proceeded against. Here, it was given to the attaching creditor, or for his benefit. There it was voluntarily given. Here it was *in invitum*. It would have been no defence to the former bond that a valid writ of attachment had not issued: and the question whether a writ had issued, not going to the validity of the bond itself, the defendant was estopped by the recital. The case cited from Blackford is like that of *Bowne v. Meller* (6 *Hill*, 496), where an action was maintained on an attachment bond given by the party procuring a void attachment. The court said "Bowne, who procured the void attachment, was not at liberty to show the irregularity for the purpose of defending the action."

It is undoubtedly a well settled rule that a party who has executed a deed is thereby estopped from disputing not only the deed itself, but every fact which it recites. (*Trimble v. The State*, 4 *Blackf. Rep.* 437. *Cowen & Hill's Notes*, 1430, 1460. 3 *J. Marsh.* 160. 4 *Id.* 655. 7 *Conn. Rep.* 102.) Thus the obligees in an administration bond were held estopped, by the recital in the bond, to deny the appointment of the administrator. (*Outler v. Dickinson*, 8 *Pick.* 386.) But such is not the effect of a void bond; and if it happens that a fact misstated in the bond is the one which the defendant desires to prove for the purpose of establishing the invalidity of the bond, it can not be that a defendant is remediless. If so, the statute of usury could be evaded, by setting forth in the bond that only seven per cent was agreed to be paid. A bond obtained by duress could not be defended against, if it was set forth in the bond that it was voluntarily given. In short, every bond, however illegal the consideration, could be placed beyond the reach of controversy by a simple recital in its condition. This can not be. A mere recital in a bond can not be made to operate, by way of estoppel, so far as to preclude the obligees from show-

ing the instrument void. Avoiding the deed avoids also the estoppel.

Nor do I think the other positions, assumed by the plaintiff's counsel, are tenable. There was no *estoppel in pais*. Woodworth, by giving the bond and applying to discharge the warrant, did nothing to mislead the attaching creditor; nor did the latter take any step affecting his rights in consequence of the giving of the bond. (9 *Bar. & Cress.* 577. 6 *Pick.* 455.) I think also there was no waiver of the jurisdictional defect. The judge had no jurisdiction; and Woodworth did no act to confer any. A trespass had been committed, by levying on his property under void process, and he, acting on the defensive, could not procure its release, except by complying with the forms prescribed by law. He therefore executed the bond, and the assumed power of the officer over the property ceased.

In *Homan v. Brinckerhoof* (1 *Denio*, 184), a constable, upon an attachment which was void because no sufficient bond had been given, seized property which was claimed by a stranger who procured the same to be given up, upon executing the bond required in such case (2 *R. S.* 231, § 33); and it was held that the plaintiff, being a trespasser in taking the property, could not maintain an action on such bond. There is no distinction in principle between that case and the one now before us. The decision in that case was put on the broad ground that an action could not be maintained on a bond given to obtain the liberation of property illegally taken. If there was an estoppel or a waiver in one case, there was in the other also.

In the *Matter of Faulkner* (4 *Hill*, 598), the affidavits on which a foreign attachment issued were insufficient to confer jurisdiction. The debtor applied to the Supreme Court to set aside the attachment and all subsequent proceedings. It appeared that trustees had been appointed, and the debtor had previously applied for and had a hearing in the common pleas, pursuant to 2 *R. S.* p. 9, § 43. But the court held that these acts constituted no waiver of his right to have the proceedings set aside as void. Bronson, J. said, "This was not a proceeding in *personam*, or an action where a voluntary appearance would be sufficient to confer jurisdiction over the person although not regularly served with process. It was a proceeding *in rem*, and the debtor only came in to save his property. It

was not a case where there could be any such thing as a technical appearance. (*See per Parsons, C. J. in Bissell v. Briggs*, 9 *Mass. Rep.* 469; *Pawlings v. Bird's Ex'rs*, 13 *John.* 192, 207; *Cowen & Hill's Notes*, 908, 1024.) He undertook to prove he was not an absconding or concealed debtor, for the purpose of having the warrant discharged. But I do not see how that could confer jurisdiction on the judge who had previously issued the warrant.

In *Broadhead v. McConnell* (3 *Barb. S. C. Rep.*, 175), a defendant was arrested and brought before an officer under the 4th section of the act to abolish imprisonment and to punish fraudulent debtors. The affidavits on which the warrant was issued were insufficient; and the defendant objected to the jurisdiction of the officer on that ground. The objection being overruled, the defendant proceeded to controvert the facts and circumstances on which the warrant was issued; and, afterwards, to prevent being imprisoned, he gave his bond, with sureties, as provided in the 10th section of said act. It was held that he was not estopped from denying the officer's jurisdiction; nor from setting up his want of jurisdiction as a defense to an action on the bond.

The giving of the bond, then, could not have the effect to confer jurisdiction where, as in this case, there was a total want of it. The bond is a part of the attachment proceedings; and must stand or fall with it. The officer having no right or jurisdiction to issue the attachment, it follows, of course, that he had no right to take the bond.

I do not put this decision upon the ground that the bond was void under 2 revised statutes, page 286, section 59, as being taken *colore officii*. It has been held that that provision applies only to securities executed to the officer, and not to those taken to and for the benefit of the parties suing out the process. (*Ring v. Gibbs*, 26 *Wend.* 510. 3 *Greenl.* 161. 8 *Id.* 426. 5 *Mass. Rep.* 541. *Id.* 314. 7 *Id.* 101.) Though in *The People v. Meighan* (1 *Hill*, 298), a bond taken by a justice of the peace in a prosecution for bastardy, and containing in addition to the provisions required by law, others imposing further obligations on the obligor, was declared within the statute, and adjudged void, as being taken *colore officii*.

This bond would be void, independent of any such statutory provision. There being no jurisdiction there was no bond; the levy was a trespass, and the taking of the bond wholly unauthor-

ized. In *Olds v. The State* (6 *Blackf. Rep.* 91), a justice of the peace, without any authority by law, appointed a constable and took his bond with surety for the discharge of his duties. The appointment and bond were adjudged void. So in *Commonwealth v. Jackson's Ex'r* (1 *Leigh*, 485), the hustings court of Williamsburgh, without authority of law, for the act, appointed a collector of the public taxes for the city, and took his bond with surety for due collection, &c. The court of appeals held the bond not valid and obligatory as to the surety at least. In neither of these cases were the bonds taken to the officers or court appointing, or for their benefit.

There should be judgment for the defendant on both demurrers, with leave to the plaintiff to amend, on payment of costs.

SUPREME COURT.

DECKER v. BRYANT.

(7 *Barb.*, 182. *Decided* 1849.)

A warrant, as against the person named therein, if fair upon its face, and showing jurisdiction in the person issuing it, will protect the officer acting under it. But when it is sought to use the process as against third persons, as to attack the *bona fides* of a transfer of property, and it is insisted that the sale is fraudulent as against creditors, the preliminary proceedings necessary to establish jurisdiction must be shown.

Third persons are not estopped by the appointment of trustees under the 62d section of the act concerning attachments against absconding, concealed, and non-resident debtors, from contesting the jurisdiction of the officer, and the consequent validity of the warrant of attachment issued by him.

And no greater effect, as evidence, can be claimed for the report of the officer entertaining the proceedings, made to the supreme court in pursuance of the 68th section of that act, than is given to the record of the appointment of trustees.

It is not conclusive, on the question of jurisdiction over the case made by the attaching creditors, on their application for the attachment.

What facts are necessary to be alleged, in the affidavits, &c. upon an application for an attachment under the act concerning absconding, concealed, and non-resident debtors.

A party, after having introduced evidence, before the jury, on the trial of a cause, cannot be permitted to withdraw it, on finding that it does not answer his pur-

^{*}pose. Evidence, once given, belongs to the cause, and is the common property of all the parties.

G. C. Sherman, for the plaintiff.

B. Bagley, for the defendant.

By the Court, ALLEN, J. It was not made a point upon the trial that the warrant of attachment, being fair upon its face, protected the officer, and that the defendant was not bound to go back of it and show jurisdiction in the officer issuing it, and therefore the point was not properly taken upon the argument of the motion for a new trial, upon a bill of exceptions. But had this point been taken upon the trial, it could not have aided the defendant. As against the person named in the process, the warrant, if fair upon its face, and showing jurisdiction in the officer, would have protected the defendant, an officer acting under it. But when it is sought to use the process as against third persons, as in this case, to attack the *bona fides* of a transfer of property, and it is insisted that the sale is fraudulent as against creditors, the preliminary proceedings necessary to establish jurisdiction must be shown. (*Van Etten v. Hurst*, 6th Hill, 311.) The question upon the bill of exceptions in this cause is whether the officer had jurisdiction to issue the warrant under which the defendant justifies the act complained of. It is provided by the 62d section of the act concerning attachments against absconding, concealed and non-resident debtors, (2 R. S. 12,) that the appointment of trustees, the record thereof, and the transcript of such record, duly certified, shall in all cases except on a hearing of a petition, as provided in the act, be conclusive evidence that the debtor therein named was a concealed, absconding, or non-resident debtor within the meaning of the act, and that the appointment and all the proceedings previous thereto were regular. In *Hubbell v. Ames* (15 Wend., 372), it was held that the production of the appointment of trustees was sufficient to show that the officer had jurisdiction. But it was not decided in that case that the debtor, or any other person, was concluded by such appointment from alleging that the preliminary proceedings were fatally defective. In the *Matter of Hurd* (9 Wend., 465), and in the *Matter of Faulkner* (5 Hill, 600), it was decided that the only effect of the estoppel created by

the act was to prohibit the debtor from disproving the facts alleged in the petition, and that the question whether the officer had jurisdiction was, notwithstanding the appointment of trustees, an open question to the debtor. Nelson, J., in *Hurd's case*, says, "its effect is to preclude all inquiry into the regularity of the proceedings, and to estop the party from denying that he was an absent debtor; but it does not debar him from contesting the jurisdiction of the officer, or insisting that his case is not within the statute." Bronson, J. in *Faulkner's case* says, "It [the estoppel created by the 62d section] does not touch the question whether the proceeding was not utterly groundless at the first, taking the case as it appeared in the *ex parte* application of the creditor. The question, for aught that I can see, must always remain open to the debtor; for if the officer had no jurisdiction, the whole proceeding is *coram non jndice*." If the debtor is not estopped by the appointment of trustees from contesting the jurisdiction of the officer and the consequent validity of the warrant, most certainly third persons who have no other means of testing the validity of the proceedings should not be estopped by such act. The defendant did not give in evidence the appointment of trustees, and the record thereof, but introduced the report of the officer made to the supreme court in pursuance of the 68th section of the act (2 R. S. 13), which requires such report to be made within twenty days after the appointment of trustees, and declares that "such report and a certified copy thereof under the seal of the court, and attested by the clerk, shall be conclusive evidence that the proceedings stated therein were had before such officers." No greater effect, as evidence, can be claimed for this report than could be claimed for the record of the appointment of trustees. At most it is only another mode of proving such appointment. It is therefore not conclusive, on the question of jurisdiction upon the case made by the creditors on their application for the attachment. Whether it proves the appointment of trustees, so as to dispense with the other evidence of the preliminary proceedings, it is not necessary to determine. In *Hubbell v. Ames*, the defendants gave in evidence the appointment of trustees, as well as the report of the officer showing the fact. But the report itself, I think, fails to show jurisdiction in the officer. It certainly is not evidence of any thing more than is stated in it; and we cannot

intend that the proof established facts not alleged as a ground for the proceeding. The application was for a warrant against Henry G. Decker, upon a joint debt against him and one Blakely. The statute (2 R. S. 3, § 1) authorizes the attachment of the property of a debtor "whenever such debtor, being an inhabitant of this state, shall *secretly* depart therefrom with intent to defraud his creditors." The report says that the application was upon the ground that the said "Decker & Blakely being inhabitants of this state, Henry G. Decker, one of the said debtors, had then *recently* departed therefrom, with all the avails of the said Decker & Blakely, and that Ira Blakely, the other of the said debtors, was about to depart therefrom, with intent to defraud their creditors." 1. It is not alleged and therefore is not proved, that Decker had "*secretly*" departed from this state, and the "secrecy" of the "departure" is a fact, necessary to be established to bring the debtor within the purview of the act. 2. There is no intent to defraud creditors alleged against Decker. It is merely alleged that he had "*recently* departed" with "all the *avails* of Decker & Blakely." Probably it was intended to allege that he had taken with him all the property of that firm; but it is not so stated. 3. The intent to defraud creditors is charged by the application upon Blakely, who was about to depart from this state; and that did not authorize the attachment against Decker.

The plaintiff, however, not willing to rest his case upon the evidence of jurisdiction presented by the report, introduced the original application and affidavits upon which the officer acted. And having once put them in evidence he could not withdraw them upon finding they would not answer his purposes. As well might he, after proving a fact by parol, as for instance the declaration of his adversary, which, instead of aiding his defense tended directly and very strongly to overthrow it, be allowed to withdraw the evidence. For the purposes of the trial the party had made his election upon what evidence he would rely; and it would be singular indeed if, at the close of the trial of a cause, a party could select from the evidence introduced by himself such parts as he deemed favorable, and exclude the residue from the consideration of the jury. Before the evidence is given it is within the control of the party. Once given, it belongs to the cause and is the common property of all the parties. But if the defendant could have with-

drawn the evidence and been permitted to fall back on the report of the judge, still the affidavits and papers were within the reach of the plaintiff, and were, as we have seen, competent evidence for him; and if in evidence, whether given in evidence by the one party or the other is immaterial. The question is whether they show jurisdiction in the officer. I think they do not. The "facts and circumstances to establish the grounds on which the application is made" must be verified by the affidavits of two disinterested witnesses. (2 R. S. 3, § 5.) The grounds upon which the application was made were the same as stated in the report of the judge; and these grounds, if well established, were not within the act. The party is confined, in his proof, to the grounds alleged in his application. But if permitted to establish his right to an attachment by affidavits for causes not alleged in his application, the affidavits in this case were, within well established principles, entirely insufficient. They furnished no legal evidence whatever of the existence of the facts upon which the attachment could issue. Willard, one of the witnesses, states that Decker had secretly departed from the state "with intent to defraud the creditors of Decker & Blakely," and then states that he is informed by Blakely that Decker took away with him all the property of Decker & Blakely, the avails of goods bought of the attaching creditor and for which their debt was contracted, and that he, (Blakely) had nothing wherewith to satisfy the said demand. 1. The witness does not state that he believes the information derived from Blakely to be true, and does not allege that as a fact or circumstance upon which he founds his allegation of the secret departure of Decker with intent to defraud his creditors. 2. There is no reason stated why the affidavit of Blakely was not procured. His statement was strictly hearsay, and may have been made for the purpose of enabling the creditors to procure the attachment against Decker. And this is highly probable, from the fact that the plaintiff's agent did not venture to swear to his belief of its truth. It was in no sense legal evidence upon which the officer had a right to act. (*Matter of Bliss*, 7 *Hill*, 187.) Even if competent with other facts, it was entirely incompetent alone. (*Miller v. Brinkerhoff*, 4 *Denio*, 118.) 3. The affidavit that the debtor had absconded with intent to defraud his creditors, was insufficient. The intent was matter of opinion—a conclusion from facts which

should have been stated by the witness, in order that the officer could judge as to their sufficiency. (*Smith v. Luce*, 14 Wend., 237; *Ex parte Robinson*, 21 id. 672.) In *Miller v. Brinkerhoff* the affidavit was stronger than in this case, but was held insufficient to protect the officer, in an action of trespass brought by the debtor for property taken under an attachment issued by a justice of the peace. If the other affidavit was sufficient in form it would not aid the defendant, as the statute requires the "facts and circumstances" to be established by two witnesses. But the affidavit of Parker is also defective. 1. The first circumstance stated, viz. that the debtors had not the spring previous sent any remittance to their creditors, is stated upon belief only. (*Kingsland v. Cobman*, 5 Hill, 608.) 2. It states that Decker had "absconded," without stating that he had left the state, or with what intent he had left. He should have stated the circumstances under which he left, so that the officer could judge whether he had secretly departed from the state with intent to defraud his creditors. 3. He should have stated what he saw, and the manner in which they conducted their business, from which he inferred an intent to defraud creditors. 4. The assignment of Decker & Blakely is stated upon information and belief. (*Ex parte Haynes*, 18 Wend., 615.) And the mere fact that they had sold their property, or made an assignment, is not legitimate evidence, alone, of an intent to defraud creditors. (*Connell v. Lascells*, 20 Wend., 77, and the cases cited above.) Neither affidavit was sufficient, and the attachment was unauthorized.

A new trial is denied.

SUPREME COURT.

WATERS v. WHITEMORE.

(13 Barb., 634. Decided 1852.)

Section 19 of title 9 of the revised statutes, relating to justices' courts, is still in force, notwithstanding the 43d section of the non-imprisonment act of 1831.

Hence, in order to obtain a summons, returnable in two days, under section 33 of the non-imprisonment act, the justice must be furnished with the same proof of the non-residence of the defendant as was required by the provisions of the revised statutes to authorize the issuing of a warrant against such defendant, and in addition thereto the affidavit of the applicant for such summons should state that the cause of action is founded upon a claim arising on a contract, according to the provisions of section 31 of said act.

Until such proof is made, the issuing of a short summons is wholly unauthorized, and the justice will acquire no jurisdiction of the case.

THIS action was commenced in a justice's court, to recover the sum of forty dollars and interest, alleged to be due and owing from the defendant to the plaintiff. The defendant was a resident of Madison county, and the action was commenced by a short summons, before a justice in Chenango county. No affidavit or other proof was made that the defendant was a non-resident of Chenango county, or that the cause of action was such that no warrant could legally issue therein against the defendant. The objection to the process was raised in the justice's court by the defendant and overruled by the justice. The plaintiff recovered a judgment for the amount of his demand, in the justice's court, which was affirmed by the county court.

By the Court, Crippen, J. By section 33 of the non-imprisonment act of 1831, it is provided that whenever by the provisions of section 30, of the same act, no warrant can issue, and the defendant shall reside out of the county, he shall be proceeded against by summons or attachment, returnable not less than two nor more than four days from its date; which shall be served at least two days before the time of appearance mentioned therein; and if such defendant be proceeded against otherwise, the justice shall have no jurisdiction of the cause.

By the provisions of the revised statutes, no person can be proceeded against by summons out of the county in which he resides.

(2 *R. S.* 160, § 13, 2d *ed.*) The 17th section of the same act authorizes a justice of the peace to issue a warrant when the defendant is a non-resident; and section 19 enacts that in all cases, on application for a warrant, except where the suit is commenced by summons and the same is returned served by copy, the person applying shall by affidavit state the facts and circumstances showing the grounds of his application. Section 33 of the non-imprisonment act of 1831 substitutes the process of summons in the place of a warrant, against a non-resident defendant in all cases where the body is not liable to imprisonment. The same section authorizes an attachment to issue in like cases. By section 43 of this act it is declared that all the provisions of title 4 of the revised statutes relating to justices' courts, not expressly repealed, and not inconsistent with the provisions of that act, shall be in full force and effect and apply to the provisions of said act so far as they relate to proceedings in justices' courts.

The question then arises, whether section 19 of title 4, above cited, is still in force or not. It is not expressly repealed by the provisions of the non-imprisonment act of 1831; neither have I been able to satisfy myself that this section is inconsistent with any of the provisions of that act. The same reasons still exist for requiring proof that the defendant is a non-resident of the county, before issuing a short summons, that existed, under the provisions of the revised statutes in order to obtain a warrant. I have no doubt that section 19, of title 4, of the revised statutes, relating to justices' courts, remains in full force. This being so, it follows that in order to obtain a summons returnable in two days, under section 33 of the non-imprisonment act, the justice must be furnished with the same proof of the non-residence of the defendant, as was required by the provisions of the revised statutes for the issuing of a warrant against such defendant; and in addition thereto the affidavit of the applicant for such summons should state that the cause of action is founded upon a claim arising on contract express or implied, according to the provisions of section 31 of said act. The same necessity exists for requiring this proof in the case of a short summons, as exists for requiring it on the issuing of a short attachment against a non-resident defendant, under section 33. That section provides for the issuing of a short summons and attachment. The summons is intended as a substitute for a war-

rant against a non-resident. I have no doubt that the issuing of such summons is wholly unauthorized, until the requisite proof is made. It can only be issued where the defendant is a non-resident, and against whom no warrant can issue. These facts however must first be established by the affidavit or proof of the party or his agent; otherwise it cannot be legally issued. Such proof is the foundation on which such process must rest; without it the magistrate cannot legally know that the applicant is entitled to a short summons. If issued in the absence of the necessary proof, the justice acts without authority and against law. He acquires no jurisdiction of the case. In my judgment the reasoning of the court in the case of *Taylor v. Heath* (4 *Denio*, 592), is entirely decisive of this question. The opinion and judgment of the court in that case is approved and adopted in *Bennett v. Brown* (4 *Comst.* 254), which should be regarded as fully settling the question. It follows therefore that the judgment of the justice, and that of the county court, must be reversed with costs.

SUPERIOR COURT, NEW YORK.

WM. B. FAIRBANKS AND OTHERS v. SMITH BLOOMFIELD AND ANOTHER.

(5 *Duer*, 434. *Decided* 1856.)

Where an officer seizes the goods of a stranger to the action by virtue of an attachment, his seizure is unlawful the same as if taken by execution.

By the Court, DUER, J. * * * * * *

But the case is widely different, when the property seized is that of a stranger to the action, and the seizure is not directed by the terms of the process. The property seized is not then in the custody of the law, for the seizure is, itself, an unlawful act, which renders the officer making, and the plaintiff directing it, at once, liable as trespassers, and gives, to the true owner, an immediate right of action against them. The familiar case is, where the goods of A. are seized, under an execution against the property of B.; and whether the seizure is made under an execution, or under an

attachment, is plainly immaterial. What has been said of an unlawful seizure, must be equally true of an unlawful detention. Where the goods detained belonged to a stranger to the action, and their detention is not justified by the terms of the process, they are not in the custody of the law; and the owner is, at once, entitled to the remedy, by an action against those who wrongfully withhold from him the possession to which he is entitled.

* * * * *

SUPREME COURT.

E. DE WITT ROBINSON v. ROBERT SINCLAIR.

(1 *How.*, 106. *Decided* 1845.)

Motion by defendant to set aside default and subsequent proceedings for irregularity, with costs.—This suit was commenced 25th December last, by declaration containing indebitatus money and merchandise, counts, only, with copy note annexed and notice that it was the only demand for which the suit was brought. On the 14th January last, defendant's attorney prepared plea of general issue, affidavit of merits, and notice of set off, and served *copies* thereof on plaintiff's attorney by putting same in post-office at New-York, directed to plaintiff's attorney at Albany, and paying postage. On the 18th of January last defendant's attorney received from plaintiff's attorney through the post-office the copy plea, affidavit of merits, &c., which he had served, with a notice from plaintiff's attorney that he could not accept them, inasmuch as the plea was not accompanied by the *original* affidavit required by the rules and practice of this court. The same day they were received, defendant's attorney annexed the original affidavit to the copy plea, and returned same by mail to plaintiff's attorney. On the 24th of January last, plaintiff's attorney returned the same to defendant's attorney, with a notice that they came too late; the defendant's default was entered previous to the 18th of January, the day on which defendant's plea, &c. were mailed in New-York. The defendant has annexed to his moving papers the original affi-

davit of merits to annex to his plea, sworn to on the 14th of January last, and has no other affidavit of merits for this motion.

S. Stevens, Defendant's Counsel. *F. Sayre*, Defendant's Attorney.

M. T. Reynolds, Plaintiff's Counsel. *J. Koon*, Plaintiff's Attorney.

Beardsley, Justice.—Held, that the original affidavit should have accompanied the plea served, and that a general affidavit of merits must be made on the motion.

Decision.—Motion denied with costs, without prejudice.

SUPREME COURT.

GEORGE R. DAVIS, RECEIVER, &C., v. WILLIAM RICH ET AL.

(2 *How.*, 86. *Decided* 1846.)

Motion by defendants at last December special term, for judgment as in case of non-suit. The venue in the affidavit made on the part of the defendants for the motion, stated it to be "Albany county, ss.," and the affidavit was sworn to before "Abram B. Olin, Recorder of the city of Troy" (Rensselaer county).

L. J. Lansing, Defendant's Counsel. *L. J. Lansing* Defendant's Attorney.

D. C. Woodcock, Plaintiff's Counsel. *C. M. Davis*, Plaintiff's Attorney.

Plaintiff's counsel objected to reading the affidavit for the reason that it appeared that the officer before whom it was sworn, had no jurisdiction to take it.

Jewett, Justice.—Denied the motion with costs, without prejudice, for the reason stated in the objection.

SUPREME COURT.

CORNELIUS C. COLEGATE ET AL. v. SEYMOUR N. MARSH.

(2 How., 137. Decided 1846.)

Motion by defendant to set aside default and subsequent proceedings. The defendant's plea and affidavit of merits annexed were served on the same day that his default had been entered by plaintiff's attorney, but after the default had been actually entered; plaintiff's attorney refused to accept the service, and returned them to defendant's attorney, stating that defendant's default had been entered. Defendant's papers for this motion contained a copy of the plea and affidavit of merits incorporated in an affidavit of defendant's attorney, and also the original plea and affidavit of merits served, annexed, but did not contain any affidavit of merits for the motion. Plaintiff's counsel cited 1 *Howard's Practice Reports*, 166.

O. Allen, Defendant's Counsel. *John Cumming*, Defendant's Attorney.

H. Harris, Plaintiff's Counsel. *W. H. Taggard*, Plaintiff's Attorney.

Beardsley, Justice.—Denied the motion with costs, without prejudice, on the ground that there was no affidavit of merits for the motion.

SUPREME COURT.

ALEXANDER SNYDER v. CHARLES A. OLMSTEAD.

(2 How., 181. Decided 1846.)

Motion by defendant to set aside proceedings on the part of the plaintiff, &c. The principal affidavit upon which the motion was founded, was made by defendant's attorney; the venue in the affidavit was "Albany county" and was sworn before, and the jurat signed by, "J. Romeyn, judge Rensselaer county courts and counsellor in Supreme Court."

D. Wright, Defendant's Counsel. *L. J. Lansing*, Defendant's Attorney.

N. Hill, Plaintiff's Counsel. *E. Pearson*, Plaintiff's Attorney.

Plaintiff's counsel objected to the reading of the affidavit on the ground that the officer before whom it purported to have been sworn, had no jurisdiction to take it; and cited 2 Howard, 86, 127.

Jewett, Justice.—Sustained the objection, and denied the motion with \$7 costs, without prejudice.

SUPREME COURT.

JOHN SANDLAND v. EDSON ADAMS.

(2 How., 127. Decided 1846.)

Where the venue in an affidavit is laid in one county, and the officer before whom the oath is taken resides in another; held void, for want of jurisdiction.

THE affidavit presented by the defendant to the court in behalf of this motion, was made by defendant's attorney, and the venue therein was "Westchester county." The affidavit was taken before a commissioner of deeds appointed for, and residing in, the city and county of New York.

Plaintiff's counsel cited 2 Howard's Practice Reports, 86.

M. T. Reynolds, Defendant's Counsel. *G. Mills*, Defendant's Attorney.

J. Edwards, Plaintiff's Counsel. *York & Cook*, Plaintiff's Attorneys.

Beardsley, Justice.—Motion denied, without prejudice, on the ground that the venue in the affidavit was laid in Westchester county, and the officer who took the affidavit resided in the city and county of New-York, and had therefore, *no jurisdiction*. (a)

(a.) By chap. 807 of the Laws of 1873, notaries public appointed for the city and county of New York, upon filing a certified copy of their appointment, &c., &c., may exercise all the functions of their office in Westchester and other counties.

SUPREME COURT.

CUTLER v. BIGGS.

(2 *Hill*, 409. *Decided* 1842.)

An affidavit of merits made and used for one purpose in a cause, cannot be used for another; e. g. an affidavit to change the venue will not be received as the foundation of a motion to set aside a default for want of a plea.

And where an affidavit of merits was served with the defendant's plea, pursuant to rule 1st of May term, 1840; *held*, not sufficient to prevent the taking of an inquest in the cause at the circuit out of its order on the calendar.

C. HUMPHREY, for the defendant, moved to set aside an inquest taken at the circuit out of its order on the calendar. It appeared that the cause was regularly noticed for an inquest, and that no affidavit of merits was interposed in season. But a regular affidavit of merits had been served with the plea, pursuant to the statute and the rule of this court. (22 *Wend.*, 644, *note*.) The usual affidavit to prevent an inquest had been sent to the counsel for the defendant by mail; but did not reach his hands till after the jury were empaneled for the inquest.

Humphrey submitted that the affidavit served with the plea was sufficient; and likened it to the case of an affidavit served for one circuit, which had been held sufficient for any subsequent circuit at which the cause might be noticed. (*Van Rensselaer v. Hamilton*, 4 *Cowen*, 539, 540; *Prescott v. Roberts*, 6 *id.* 45.)

P. Cagger, contra.

By the Court, COWEN, J. The analogy was so striking between this and the cases mentioned by Mr. Humphrey, that I reserved the point, in order to confer with the judges. Our recollection is, that affidavits of merits made in the course of the cause for one purpose, have uniformly been rejected when proposed to be used for another. For instance, an affidavit of merits, made with a view to change the venue, would not be received as the foundation of a motion to set aside a default for want of a plea. Many other like instances might be mentioned. To grant this motion would, therefore, be to work such an extensive and inconvenient innovation in practice as we do not feel warranted in allowing. I would grant the motion

on terms, if an affidavit of merits had now been made; but I find none among the papers handed up. Although two affidavits of merits have heretofore been made in this cause for other purposes, I can regard neither as sufficient, because neither was made with an immediate view to this motion.

The motion must be denied with costs; but, under the circumstances, without prejudice to the right of renewing it.

Ordered accordingly.

SUPREME COURT.

WADDELL v. COOK.

(2 *Hill*, 47. *Decided* 1841.)

The sale by an officer of the *entire property* in goods owned by two jointly, on a *fi. fa.* against one of them, is an abuse of his legal authority which renders him liable as a trespasser *ab initio*. And see *note (a)*.

Semble, that the case of *Mersereau v. Norton* (15 *John. Rep.* 179), is overruled. See *note (a)*.

The share of one of several partners, in goods of the firm, may be seized and sold on a *fi. fa.* for his individual debt; and, as incidental to this right, the officer may take possession of the goods seized, and deliver the whole to the purchaser. See *note (a)*.

Semble, that the debtor partner could be joined with the others, in an action against the officer for selling the entire interest. See *note (a)*.

ERROR from the New York C. P. Cook brought trespass against Waddell, a marshal of the U. S. for seizing and selling the goods of Cook under a *fi. fa.* against Bowne, who was a joint owner of the goods with Cook. The marshal sold the whole interest in the goods. There was evidence in defence tending to show that the plaintiff consented to a sale of the whole interest.

The defendant at the trial moved for a nonsuit, on the ground that trespass would not lie; and also because the plaintiff had consented to the sale. The motion was overruled, and the question as to the plaintiff's consent submitted to the jury, the circuit judge instructing the jury, that if they found such consent, their verdict should be for the defendant; but if otherwise, then their verdict

should be in favor of the plaintiff for one-half the value of the property. Verdict for the plaintiff. The defendant sued out a writ of error.

S. A. Crapo, for plaintiff in error.

A. Cook, defendant in error, in person.

By the Court, COWEN, J. The question was properly submitted to the jury by the court below, on the question of Cook's assent to the sale. There being no consent, we think trespass *de bonis* was properly brought. True, the taking was lawful. The marshal came, by the levy, into the place of Bowne the co-tenant, thus acquiring and holding the possession. So far, there can be no just complaint; and it would seem by the case of *Mersereau v. Norton* (15 John. 179), that though the marshal went on and sold the whole property, yet trespass would not lie by Cook against the purchaser. The legal effect of the sale was merely to vest Bowne's share in the purchaser, who thus became a tenant in common with Cook; and so not liable in trespass, unless he destroyed the chattels. (*Id.* 179, 181.) Chancellor Kent has remarked, that a sale of the whole interest by one co-tenant would subject him to either trover or trespass at the suit of his co-tenant. (2 *Kent's Com.* 350, note b. 4th ed.) That trover would lie, we lately held in *White v. Osborn* (21 Wend., 72; and *vid. Barton v. Williams*, 5 Barn. & Ald. 395). It is said, that none of the cases cited by Chancellor Kent, except *Mersereau v. Norton*, wherein judgment was against the plaintiff, were actions of trespass; and that seems to be so. I have not, however, examined them very particularly, because I have come to the conclusion that the case at bar depends on considerations other than those which pertain to the mere relation of one tenant in common, or joint tenant, to another. The latter may take the exclusive possession of the chattel in respect to his common title; and it may be wrong to say that for a mere sale he shall be liable in trespass. But the sheriff (or here the marshal), acts under an authority in law, which, though it extends to a total dispossession of both the co-tenants by an execution against one, yet the same law denies him the right to sell the entire property. In attempting to do so, though the act be nugatory, yet the law may

well treat it as such an abuse of legal authority as renders him a trespasser *ab initio*. This is the exact case of *Melville v. Brown* (15 *Mass. Rep.* 82), which, though it does not appear to have been much considered, yet was distinctly, and we think properly, placed by the court on the principle mentioned.

Judgment affirmed. (a)

(a.) The case of *Phillips v. Cook* (24 *Wend.*, 389) decides, that the sheriff may, *at law*, under a *fi. fa.* against one of several partners for his individual debt, seize and sell his share; and that in so doing, the sheriff may take possession of and remove the whole, and deliver the whole to the purchaser. (*S. P. Reed v. Shepardson*, 2 *Verm. R.* 120; *Whitney v. Ladd*, 10 *id.* 165; *Welch v. Clark*, 12 *id.* 686.) But the case itself, and the authorities cited, will be found to give no sanction whatever to the idea that the sheriff would be protected against an action of trespass, trover or replevin, at the suit of the other partners, provided he should expressly sell the whole interest. Chief Baron Comyn laid down the rule with a like restriction in the *King v. Manning* (Com. Rep. 619, decided in 12 *Geo.* 2). He said: "If A., B. and C. are partners, and judgment and execution is sued against A. only, his share of the goods can be sold. It is true the sheriff may seize the whole, because the share of each being undivided cannot be known; and if he seize more than a third part, he can sell only a third part of what is seized; for B. & C. have equal interest with A. in the goods seized; but the sheriff can only sell the part of him against whom the judgment and execution was sued." He cited several of the cases relied upon in *Phillips v. Cook*, all of which will be found to contain the restriction, that the debtor's share alone can be sold by the sheriff. The case held that the sheriff having a right to take the goods and sell them, necessarily took the incidental power of delivering them to the purchaser—that this was conferred by the law—according to the principle laid down in *Williams v. Amory* (14 *Mass. Rep.*, 27); viz. "when the law authorizes an act, and nothing is done but what is necessary to accomplish the act, those who perform it may not be considered trespassers." Therefore it was held, that a statute authorizing the sheriff to sell the debtor's *real estate* on execution, conferred, as a necessary incident the right to enter and levy on a reversionary interest of the debtor in the land. Again, it is said, "In no case can a person be liable to an action as for a tort, for an act which he is authorized by law to do." (*Calender v. Marsh*, 1 *Pick.*, 418, 534. *Vid. what was said by Walworth, Ch. in Burrall v. Acker*, 23 *Wend.* 609, 610.)

For the act of selling the proper share, and delivering possession of the whole, therefore, no action will lie by any one. And though the sheriff should even assume to sell the whole, it may be quite doubtful whether an action would lie by all the partners or their assignees. Such would probably be a misjoinder, within the reasoning in 24 *Wend.*, 397, and the case of *Owings v. Trotter*, cited there, which will also be found directly sustained by the decision of the K. B. in *Jones v. Yates*, 9 *Barn. and Cress.* 532; 4 *Mann. and Ryl.* 613. *S. C.*

But it is believed that no case can be found, save *Mersereau v. Norton*, cited in the text, denying the right of the injured partner, in his own name alone, to sue

the officer. It is indeed true, as said in that case, that the legal effect of the sheriff's misconduct, carries no right to the purchaser beyond the particular share; but the principle that here is an authority given by law, which the sheriff has abused by going positively beyond it, and committing a misfeasance, was not adverted to. His right was to take and deliver possession of the particular goods seized, barely on the ground that he could not otherwise satisfy the exigency of the writ; like his entering the house of a stranger to take the goods of the debtor which happen to be there. He is bound in that case, to do no unnecessary damage to the stranger in the exercise of his authority; and should he take the goods of the stranger in the house, or sell them, could there be a doubt that this would be such an excess as to render him a trespasser *ab initio*? So, of the shares not liable—though possession be necessarily taken, yet a sale, or the exercise of any control over the property of a stranger to the writ, is a wrong; it is an excess of the legal authority, and the stranger having a present right of possession, even after a delivery to the purchaser, may maintain his action as for a conversion of his own share, provided he sue in his own name alone. The objection which arises against trespass by the reversioner, for the sheriff seizing and selling the reversionary interest under an execution against the bailee for a term of time, does not, therefore, arise. That goes on the plaintiff not having a right to the possession of the goods at the time of the seizure, either exclusively or in common with any other person. Thus though a sheriff may seize and sell the debtor's property, subject to the lien of A., yet if he advertise or sell absolutely, A. may bring replevin. (*Wheeler v. M'Farland*, 10 *Wend.*, 318.)

It is entirely settled, that the sheriff cannot sell any more than the debtor partner's share. The doubt has been whether, even at law, he may sell that. In some cases it is said that he cannot; and a recent learned opinion has been delivered to that effect by Parker, J. of the N. H. superior court. (*Morrison v. Blodgett*, 8 *N. Hamp. R.* 238.) The contrary was settled by *Phillips v. Cook*, as the general rule in this state; and most of the authorities on the point adverted to. The doctrine of preference in favor of partnership property, was there held to belong exclusively to a court of equity, as has also been held in several other states. (*Vid. in addition to the cases cited in 24 Wend.*, 402, 3, *Chatzel v. Bolton*, 3 *M' Cord*, 33, in connection with *Bowden v. Schatzell*, *Bail. Eq. Rep.* 360. *Vid. also Burton v. Green*, 3 *Carr. & Payne*, 306, and the note to that case; *Vienne v. McCarty*, 1 *Dall.* 154; *McCoombe v. Dunch*, 2 *id.* 73; *Goodwin v. Richardson*, 11 *Mass. Rep.* 472, *per Jackson, J.*)

SUPREME COURT.

WALKER v. CRUIKSHANK.

(2 *Hill*, 296. *Decided* 1842.)

Where a city charter provided, that penalties imposed by the ordinances of the common council might be recovered "in an action of debt in any court having cognizance thereof," and that "the first process in any such action, brought before a justice of the peace, should be by warrant:" *held*, that the penalties might be sued for, in a justice's court; and that the warrant might issue without the preliminary affidavit required by 2 *R. S.* 229, § 18, the charter having been granted since the passage of that statute.

Seem, that an action of debt to recover a penalty imposed by the by-law of a municipal corporation, may be brought in a justice's court, although the statute authorizing the by-law contains no provision conferring jurisdiction upon justices of the peace.

In an action for false imprisonment, the defendant pleaded in justification, that the act complained of was an arrest of the plaintiff under a warrant issued at the instance of the defendant, who was city attorney of Utica, for the violation by the plaintiff of an ordinance made by the common council; but the plea did not aver that the plaintiff had in fact violated the ordinance: *Held*, nevertheless, that the plea was good.

That part of the bill of rights declaring that "no warrants can issue but upon probable cause supported by oath," &c., relates only to criminal process, and has no application to arrests in civil suits.

ERROR to the Oneida common pleas. Cruikshank sued Walker in the court below, and declared for trespass and false imprisonment. The defendant pleaded *first*, not guilty; *second* and *third*, special pleas of justification. In the second plea, the defendant set forth portions of the "act to incorporate the city of Utica," passed February 13, 1832. (*Stat.* 1832, *p.* 17.) By the thirty-eighth section of the act, it was enacted that the common council should, among other things, have power to make and establish ordinances, rules, regulations and by-laws, to prevent vice and immorality; to preserve peace and good order; to restrain and suppress disorderly and gaming houses, billiard tables and all instruments and devices used for gaming. By the fortieth section, the common council was authorized to enforce observance of their ordinances and by-laws by imposing penalties not exceeding \$25, for any one offence, "to be recovered with costs, in an action of debt, in any court having cognizance thereof." The 42d section provided that actions brought to recover any penalty incurred under the act, or

the ordinances, by-laws or police regulations made in pursuance of the act, should be brought in the corporate name [of the city.] "The first process in any such action, brought before a justice of the peace, shall be by warrant; and execution may be issued thereon immediately on the rendition of the judgment." The plea then set out the 5th section of a law or ordinance made by the common council of the city, on the 27th of April, 1832, as follows: "If any person shall keep a billiard table, shuffle board, eo-table, faro-bank, or any other instrument of gaming where, or on, or with which, money, liquor or other articles shall in any manner be played for in said city, or if any person shall keep a disorderly or gaming house in said city, such person shall for every offence forfeit and pay a penalty of twenty-five dollars," &c. After setting out portions of the charter and by-law, the defendant averred that before, and at the time when, &c., he was attorney for the city, duly appointed by the common council, in pursuance of the 26th section of the charter, which authorizes such appointment: that on the 11th of May, 1840, he, as such attorney, directed to be issued by John Parsons, a justice of the peace in and for said city, a warrant against the plaintiff for a violation of the said 5th section of the laws and ordinances of the city; that thereupon a warrant was issued by the justice, directed to any constable &c., commanding him in the name of the people &c., to take the plaintiff and bring him before the justice at &c., to answer unto the city of Utica in a plea of debt &c., and was delivered to John Pease, a constable &c., to be executed, who took and arrested the plaintiff by his body, and kept and detained him in custody by virtue of the warrant, for the time mentioned in the declaration &c.; which is the same trespass, &c. Verification. The *third* plea was substantially like the second. The plaintiff *demurred* to each of the special pleas, and the court below rendered judgment on the demurrers in his favor. On the trial upon not guilty the jury found a verdict for the plaintiff and assessed his damages at six cents; the judgment having been rendered against the defendant on the whole record, he brought error.

W. McCall, for the plaintiff in error.

W. M. Allen, for the defendant in error.

By the Court, BRONSON, J. The plaintiff below takes no exception to the pleas in matter of form, and the only question is, whether they are good in substance. The first objection urged against the pleas is, that the justice had no jurisdiction to issue the warrant: that neither the act relating to the justices' courts nor the charter of the city give any jurisdiction to a justice of the peace in actions to recover penalties for the violation of a by-law or ordinance of the common council of that city. We are referred to 2 *R. S.* 225, § 2, *subd.* 3, giving to justices cognizance of "all actions for any penalty not exceeding fifty dollars given by any *statute* of this state;" which, it is said, does not extend to the case of a penalty inflicted by an *ordinance* or *by-law* though made in pursuance of a statute. I do not think it necessary to consider the soundness of the argument, for the first subdivision of the same section gives the justice jurisdiction of "all actions of *debt*, covenant and assumpsit, wherein the debt or balance due, or the damages claimed, shall not exceed fifty dollars;" and I see no reason why this provision should be so restricted by construction as to exclude an action of debt to recover a penalty under a by-law. The 40th section of the charter provides for the recovery of a penalty inflicted by the ordinances of the common council "in an action of debt, in any court having cognizance thereof:" and the 42d section of the charter declares that "the first process in any such action *brought before a justice of the peace*, shall be by warrant." Although the charter does not, in terms, declare that a justice shall have jurisdiction in actions for penalties under by-laws, as is the case in some other charters to which we were referred, I cannot doubt that the legislature intended these actions should be brought in justices' courts. The penalty is recoverable "with costs" (§ 40); and it would be very burdensome to a defendant to require the action for a debt which cannot exceed \$25 to be brought in a court of record.

The second point was for the purpose of raising the objection that the act incorporating the city is a private act, and has not been sufficiently pleaded; but the objection was abandoned on the argument. It was also suggested under this point that the common council could not group several offences in one ordinance or by-law; but the counsel was also understood to say that he did not rely on this objection.

It was not necessary for the defendant to aver in his pleas that the plaintiff had in fact violated the ordinance. It was the duty of the defendant as attorney for the city, to sue for the recovery of penalties, and the statute gives him no choice but to proceed by warrant. (§ 42.) If he acts maliciously and without probable cause, the injured party may have redress by an action on the case. But where, as in this case, his motives have not been questioned, it is impossible to maintain that he is liable to an action of trespass and false imprisonment if he happens to be mistaken in supposing that a penalty has been incurred by the person arrested.

The last objection and the one principally relied on by the plaintiff is, that the warrant issued without such affidavit as is required by the act relating to justices' courts. (2 R. S. 229, § 19. *Statutes of 1831, p. 403, § 30, 31.*) But the act incorporating the city was passed since the justice act, and it provides that "*the first process in any such action [to recover a penalty] brought before a justice of the peace, shall be by warrant.*" (§ 42.) The warrant is here given without oath or affidavit; and the city attorney has no choice to proceed in any other way. The word is not *may* but *shall*. Under the justice act a warrant cannot issue except upon very special circumstances; and to hold that an attorney must comply with that act would, in many cases, amount to a denial of all remedy for a violation of the city ordinances. I see no reason why we should disregard the charter in settling this question. That differs in another aspect from the justice act. When a penalty is recovered, execution may issue immediately on the rendition of the judgment; and if there be no goods or lands, the defendant may be imprisoned in the county jail for a period not exceeding thirty days. (§ 42.) So far as the charter goes, it gives the rule of proceeding in writs to recover penalties. Beyond that, the law and practice of the court in which the action is brought must be followed. There is nothing unusual in this. There are many other cases where the common course of proceeding is either set aside or modified by special legislation.

We are referred to the bill of rights (1 R. S. 84, § 11), which provides against unreasonable searches and seizures; and declares that "no warrants can issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." This relates to

criminal process, and has nothing to do with arrests in civil suits. We have always had a bill of rights ; and yet, until within a very recent period, a man might be arrested on a *capias* and held to bail as a matter of course, and without anything more than a mere claim on the part of the plaintiff, unsupported by oath or affirmation, that the defendant was his debtor.

Each of the pleas contains a good answer to the action. The judgment of the court below must therefore be reversed, and judgment must be rendered for the plaintiff in error on the demurrers.

Ordered accordingly.

SUPREME COURT.

MATTER OF FAULKNER, AN ABSCONDING OR CONCEALED DEBTOR.

(4 *Hill*, 598. *Decided* 1843.)

The appointment of trustees in a proceeding against an absconding or concealed debtor, under 2 *R. S. p. 2 et seq.*, does not preclude him from raising the question whether the affidavits upon which the attachment issued were sufficient to give the officer *jurisdiction*.

Nor will the debtor be precluded even though he have previously applied for and had a hearing in the common pleas, pursuant to 2 *R. S. p. 9*, § 43.

The case of *Hubbell v. Ames* (15 *Wend.*, 372) explained, and the reporter's abstract of it corrected.

In order to confer jurisdiction, the affidavits of the two witnesses required by 2 *R. S. p. 3*, § 5, must state the *facts and circumstances* to establish the grounds of the application ; mere *information and belief* will not answer. *Per Bronson, J.*

If, however, facts and circumstances be stated tending to establish the grounds of the application and fairly calling on the officer for an exercise of his judgment upon the *weight* of the evidence, though he err in his estimate of it, the proceedings will not be void for lack of jurisdiction.

ON the 16th of April, 1842, an attachment was issued against Faulkner, as an absconding or concealed debtor, on the application of Thomas J. Smith, by the circuit judge of the first circuit. On the 26th of May following, Faulkner presented a petition to the judge stating that he was not an absconding or concealed debtor, and had the matter referred to the determination of the New York C. P. The court decided against him on the 5th of September. On the

13th of October the circuit judge appointed trustees, and on the 3d of November he reported his proceedings to this court. In December the debtor made a motion, on special grounds, to set aside the appointment of trustees, and a motion was made against him for the purpose of placing certain moneys within the reach of the trustees.

The debtor now moved that the attachment and all the subsequent proceedings be set aside and annulled for want of jurisdiction in the circuit judge, and for irregularity and insufficiency in the affidavits on which the attachment issued. In case this should not be granted, he then asked for a rehearing in the court of C. P. He swore that the affidavits on which the attachment issued were not reported to the C. P. by the circuit judge, nor were they filed in this court; and although inquiry and search were repeatedly made for them, they could not be found until the 20th of February last, when they were found in the office of the circuit judge. The grounds on which the question of jurisdiction is made are sufficiently stated in the opinion of the court.

J. Rhoades, for the debtor.

N. Hill, Jr., contra.

By the Court, BRONSON, J. It is said there was not sufficient evidence before the circuit judge that Faulkner was an absconding or concealed debtor, and consequently that the officer did not acquire jurisdiction to issue the attachment. The statute declares that the appointment of trustees shall be *conclusive evidence* that the person *was a concealed or absconding debtor* within the meaning of the act, and that the appointment and all the previous proceedings were regular. (2 R. S. 12, § 12.) Strong and comprehensive as this language undoubtedly is, it is settled that it does not preclude an inquiry into the fact whether a *prima facie* case was made out before the officer who issued the attachment. (*Matter of Hurd*, 9 Wend., 465.) There, the proceedings were against administrators in their representative character, who were adjudged not to be within the statute; and on that ground the attachment and all subsequent proceedings were set aside by this court, although trustees had been appointed. In *Hubbell v. Ames*

(15 *Wend.*, 372), the question came up collaterally, and it was held that the appointment of trustees was sufficient to show that the officer had jurisdiction; but it was not held to be conclusive, as is erroneously stated in the reporter's head note.

The decision in the *Matter of Hurd* necessarily affirms that the estoppel created by the 62d section has a limit, and that it does not extend to the question whether a *prima facie* case was made out before the officer in the first instance. The limitation may, I think, be successfully maintained, without overthrowing the estoppel altogether. Assuming that the attachment was properly issued, the statute goes on to provide, that the debtor may come in at any time before the appointment of trustees, and allege that he was not an absconding or concealed debtor; and the matter is then to be tried by this or some other court. The debtor thus has an opportunity to produce rebutting evidence for the purpose of overthrowing the *prima facie* case on which the attachment issued. If the decision is in his favor, the warrant is discharged; otherwise the proceedings go on. (§ 43 to 50.) If the debtor does not come in and deny the allegations on which the warrant issued, or if he appears and the matter is adjudged against him, trustees are to be appointed. (§ 58.) And then, having either produced his rebutting evidence, or having neglected the proper opportunity for doing so, he is afterwards precluded from *adducing evidence* to show that he was not an absconding or concealed debtor. So far the estoppel created by the 62d section goes, and there it ends. It does not touch the question whether the proceeding was not utterly groundless at the first taking the case as it appeared on the *ex parte* application of the creditor. The question, for aught that I can see, must always remain open to the debtor; for if the officer had no jurisdiction, the whole proceeding is *coram non judice*.

It is said that the debtor is concluded from raising this question in consequence of having applied to the judge for a hearing in the common pleas, and having had that hearing. (§ 43.) But this was not a proceeding *in personam*, or an action where a voluntary appearance would be sufficient to confer jurisdiction over the person although not regularly served with process. It was a proceeding *in rem*, and the debtor only came in to save his property. It was not a case where there could be any such thing as a tech-

nical appearance. (*See per Parsons, C. J. in Bissell v. Briggs*, 9 *Mass. R.* 469; *Pawling v. Bird*, 13 *John.* 192, 207; *Cowen & Hill's Notes to Phil. Ev.* 908, 1024.) He undertook to prove that he was not an absconding or concealed debtor, for the purpose of having the warrant discharged. (§ 43 to 48.) But I do not see how that could confer jurisdiction on the judge who had previously issued the warrant.

This brings us to the question whether such a *prima facie* case was made out before the circuit judge as to give him jurisdiction. No exception is taken to the application and affidavit made by the creditor (§ 3, 4); but it is insisted that the affidavit of the two witnesses was insufficient. They must state *the facts and circumstances* to establish the grounds on which the application is made (§ 5). It is not enough for them to say they are *informed and believe* that the debtor has secretly departed from the state, or keeps himself concealed therein, with intent to defraud his creditors or to avoid the service of civil process. They must give the facts and circumstances which induce the belief, to the end that the officer may judge of the evidence. (*Ex parte Haynes*, 18 *Wend.* 611, and cases cited; and see *Ex parte Robinson*, 21 *Wend.*, 672; *Johnson v. Moss*, 20 *id.* 145.) But these witnesses did state facts and circumstances tending to prove that Faulkner had departed from the state, or kept concealed within it with intent, &c. They state that they were acquainted with him; that he had been a proprietor of a line of stages kept at a specified place in the city; that about six weeks before, he sold out his stages and horses suddenly and broke up his business, and thereafter departed from or kept concealed in the city; and that after he sold out, his goods were sold by his landlord for the payment of rent. Before the sale by Faulkner they saw him frequently; but since that time they had not seen him at all. And they add, that it was generally understood and believed that Faulkner was keeping out of the way to avoid his creditors, and that he was concealed within this state or had absconded from it, for the purpose of defrauding his creditors. Now, although the evidence was far from being conclusive, still it had a legal tendency to make out a case, in all its parts, for the issuing of an attachment. Enough was proved to call upon the officer for the exercise of his judgment upon the weight and importance of the evidence; and if he erred in the decision of a question thus fairly

presented, the error would not be fatal to the proceedings. It is only when there is a total want of evidence upon some essential point, that the officer will fail to acquire jurisdiction.

The motion for re-hearing in the C. P. comes quite too late; and besides, I do not see that we have any power to order it.

Motion denied.

SUPREME COURT.

CLARK v. STORY.

(29 Barb., 295. Decided 1859.)

James E. Dewey, for the plaintiff.

Dewitt C. Bates, for the defendant.

By the Court, BALCOM, J. This action was brought upon an account, which the plaintiff purchased of one Myers. But in the view I have taken of the case, it is unnecessary to determine whether the account was proved so as to authorize the jury to find a verdict thereon in favor of the plaintiff.

The defendant purchased a judgment of one Basler, that he had recovered against Myers before a justice of the peace; and he introduced it in evidence on the trial of this action, as a defense, or set-off or counter-claim. The plaintiff objected to its introduction, and insisted that it was inadmissible, for several reasons. But it was properly admitted, unless the fact that five years had not elapsed, after its rendition, at the time of the trial, prevented the defendant from thus using it. It is provided by section 71 of the code, that no *action* shall be brought upon a judgment rendered in any court of this state, except a court of a justice of the peace, *between the same parties*, without leave of the court for good cause shown, on notice of the adverse party; and no action on a judgment rendered by a justice of the peace shall be brought in the same county within five years after its rendition, except upon the happening of one of several events specified therein, not shown in this case to have transpired. I am of opinion the judgment against

Myers was properly admitted in evidence, for two reasons: first, the code only prohibits *actions* on justices' judgments within five years after their rendition, and does not prevent parties thereto from using them as defenses, or set-offs or counter-claims *in* actions; secondly, if using the judgment, as the defendant used it on the trial, was equivalent to bringing an action upon it, still such use of it was not prohibited by the code, because the defendant was not a *party* to it, but only the assignee thereof. (*Tufts v. Braisted*, 4 *Duer*, 607. 12 *How. Pr. R.* 537.)

The judgment was larger than the account, and was rightfully used to extinguish it. The jury, therefore, did right in finding a verdict for the defendant. The judgment of the county court should be affirmed, with costs.

Decision accordingly.

SUPREME COURT.

LANE and LAING v. MORSE and STUDLEY.

(6 *How.*, 394. *Decided* 1852.)

T. Hastings, for defendants.

O. M. Crandall, for plaintiffs.

JOHNSON, Justice.—The venue is an essential part of every affidavit. It is *prima facie* evidence of the place where it was taken. (*Belden v. Devoe*, 12 *Wend.*, 225; *note*; 3 *Hill*, 461.) An affidavit should show upon its face that it was made before some officer competent to take affidavits, and within some place where he was authorized by law to administer an oath. This, at least, would seem to be necessary to show a legal verification.

For aught that appears, this affidavit was made in Canada, or in some other State, where the oath administered was extra judicial and void. No presumption arises that an affidavit has been made at any particular place within the state; nor, indeed, that it was made within the limits of the state, where no place is mentioned. The affidavit did not, therefore, contain enough to show that the

plaintiff in verifying his complaint, had been legally sworn, and consequently the defendants were at liberty to put in their answer without a verification. It is not a case where the defendants were bound to return the complaint, if they regarded the verification as defective, as supposed by the plaintiffs' counsel.

The judgment and execution must, therefore, be set aside, with costs of the motion.

SUPREME COURT.

PERRY AND FINEHOUT, OVERSEERS OF THE POOR OF THE TOWN OF
SARATOGA SPRINGS v. TYNEN.

(22 Barb., 137. Decided 1856.)

In an action brought in a justice's court to recover penalties for violations of the excise law, it is a sufficient indorsement of the summons if it states that such summons is issued "according to the provisions of title 9, part 1, chapter 20 of the statute of excise and the regulation of taverns and groceries."

A justice of the peace has authority to allow a constable to amend his return to a summons. And a refusal of the defendant to appear, will not deprive the justice of this right.

The power of amendment does not depend upon the appearance of the defendant in the suit.

The provisions of the code, respecting amendments, are in addition to those in the revised statutes. They are not inconsistent with each other, and both remain in force.

Whether a service upon the defendant of a copy of the indorsement on the summons is necessary? *Quære.* * * * * *

* * * * *

THIS was an action commenced before a justice of the peace, by the plaintiffs, against the defendant, for the recovery of several penalties for violations of the 15th section of the title of the revised statutes in relation to excise, &c. (1 R. S. 680, § 15, 1st ed.; 17th sec. in 3d ed.) The suit was commenced by summons. The justice indorsed on the summons, at the time it was issued, the following: "According to the provisions of title 9, part 1, chapter 20 of the statute of excise and the regulation of taverns and groceries. John T. Carr, justice of the peace." The constable

returned the summons, with a return indorsed, "that the same was personally served on the said Dennis Tynen, on the 5th of January, 1855, and a copy left with the defendant." On the return day of the summons the plaintiffs appeared by W. M. Searing, who testified to his authority to appear for them; and the defendant appeared specially by L. B. Pike, to make objections to the jurisdiction of the court, and made the following, viz: 1. That no sufficient summons was served on the defendant; 2. That the indorsement required by the statute was not made on the copy summons left with the defendant; 3. That no sufficient indorsement was made on the summons; 4. That the return was not sufficient to show the service of the summons; and 5. That the court had no jurisdiction of the person of the defendant. These objections were overruled by the court, and the defendant did not appear any further in the cause. * * * * *

W. A. Beach, for the appellant.

Searing & Putnam, for the respondents.

By the Court, PAIGE, J. The indorsement on the summons was a compliance with the 7th section of the article of the revised statutes in relation to actions for penalties and forfeitures. (2 *R. S.* 481, 1st *Ed.*) This section only requires that a general reference to the statute which gives the action shall be indorsed. The reference in this case was to the title; which is not subdivided into articles. This was sufficient. (17 *Wend.*, 87. 1 *R. S.* 687.)

The justice had authority to allow the constable to amend his return. Justices have the same powers, in respect to amendments, as courts of record. (11 *Wend.*, 214, 215. 1 *Barb. S. C. R.* 555, 556. 12 *Wend.*, 150. 15 *id.* 557. 2 *R. S.* 225, § 1. *Id.* 424, § 1, and 425, § 10. *Code*, § 173.) The provisions of the code, as to amendments, are in addition to those in the revised statutes. (3 *How. Pr. R.* 305. *Voorhies' Code*, 4th *Ed.* p. 261.) They are not inconsistent with each other, and both remain in force. The refusal of the defendant to appear, after his objections to the jurisdiction of the justice had been overruled, did not deprive the latter of his power afterwards to allow the amendment of the constable's return. The power of amendment does not depend upon the

appearance of the defendant in the suit. The revised statutes expressly allow amendments to be made at any time before judgment. Under the code they may be made after, as well as before judgment. (*Code*, § 173. 2 *R. S.* 429, § 1.) The amended return of the justice, I think, shows that the constable, when he served the summons, delivered a copy of the indorsement, with a copy of the summons, to the defendant. The return of the constable is not traversable. If it is false, the defendant has his remedy against him in an action for a false return. (14 *John.* 481.) It is questionable whether a service upon the defendant of a copy of the indorsement on the summons was necessary. (2 *R. S.* 481, § 7.)

Neither of the objections interposed by the defendant to the jurisdiction of the justice can be sustained. A sufficient summons was served on the defendant; the summons was properly served; the indorsement thereon was a compliance with the statute which directed it; a copy of it was served on the defendant, in connection with a copy of the summons, and the court had jurisdiction of the person of the defendant.

* * * * *

SUPREME COURT.

THE SUPERVISOR OF THE TOWN OF GALWAY *v.* STIMSON.

(4 *Hill*, 136. *Decided* 1843.)

As a general rule, all public officers, though not expressly authorized to sue by statute, have a capacity to sue commensurate with their public trusts and duties. *Per Bronson, J.*

In actions either *by* or *against* any of the officers named in 2 *R. S.* 473, § 92, the individual name of the incumbent must be used, with the addition of his name of office.

Accordingly, where the action was in the name of "The supervisor of the town of G.", without mentioning the name of the incumbent; held, that it could not be maintained.

DECLARATION as follows: Saratoga county, ss. The supervisor of the town of Galway in said county, plaintiff in this suit, by E.

O. S. his attorney, complains of Earl Stimson, defendant in this suit, by declaration &c.; for that whereas the said defendant on &c. at &c. was indebted to the said plaintiff in the sum &c.—and so proceeding with the common money counts in assumpsit. Demurrer and joinder.

S. Stevens, for the defendant.

N. Hill, Jr., for the plaintiff.

By the Court, BRONSON, J. At the common law, in addition to suits by individuals and corporations, there are some collective bodies, which, although not strictly corporations, have been invested by law with certain corporate powers, and may sue in respect to the matters committed to their charge. And, in general, all public officers, though not expressly authorized by statute, have a capacity to sue commensurate with their public trusts and duties. (*Overseers of Pittstown v. Overseers of Plattsburgh*, 18 John., 407; *Todd v. Birdsall*, 1 Cowen, 260, and note, p. 261–4, where most of the cases are collected; and see *Palmer v. Vandemburgh*, 3 Wend., 193; *Silver v. Cummings*, 7 Wend., 181; *Avery v. Slack*, 19 Wend., 50.) When the suit is by a public officer, it is brought in the proper name of the individual, with the addition of his name of office. I have met with no precedent of a declaration like the one now before us, where the suit is in the name of the office, without mentioning the incumbent. It seems to be a suit by the office of supervisor, and not by the officer, and cannot, I think, be maintained.

Supervisors of towns, and several other public officers, are now expressly authorized by statute to sue. (2 R. S. 473, § 92.) And although the section which confers the power does not specify the particular manner in which the officer shall proceed, it is plain enough from what follows that the legislature intended the individual should be named. When officers are sued, the action must be “brought against them individually, specifying in the process, pleadings, and proceedings, their name of office.” (§ 96.) And “no suit commenced *by* or against any officers named in this article shall be abated or discontinued by the death,” removal or resignation of such officers, or the expiration of their term of office; but

the court in which the action is pending "shall substitute the names of the successors in such office." (§ 100.) If the suit were brought by or against the office, instead of the officer, as is done here, there could be no occasion for a substitution; for the office never dies, resigns or expires, nor is it ever removed. This provision makes it quite evident that the legislature supposed the individual was to be named, as well where the suit was brought by, as against a public officer. And upon that supposition the statute proceeds to relieve the officer from the burden, which might otherwise come upon him, of paying the judgment, and makes the sum recovered a charge either upon the funds in the hands of the officer or upon the town or county, as the case may be. (§ 102-8.) When a judgment is recovered against the supervisor of a town, no execution can be awarded, unless the recovery be for the costs of a suit commenced by the officer in his individual name; that is to say, when he sues *as* an individual without adding his official character. (§ 107, and *Avery v. Slack*, 19 *Wend.*, 50.) When he names himself supervisor, and the action is properly brought in that character, if judgment passes against him, the execution is stayed, and the money is either to be paid out of the funds in his hands (§ 105), or to be levied by tax on the town. (§ 102, 3.) This makes a complete system, in which justice is done to the public and its servants, and to those who may have a legal controversy with public officers.

We are of opinion that the individual who holds the office, as well as the office itself, should have been named in the declaration, and that the action in its present form cannot be maintained.

Judgment for the defendant.

SUPREME COURT.

COLVIN v. LUTHER.

(9 Cowen, 61. Decided 1828.)

To give a justice jurisdiction under a warrant upon the 50 dollar act (sess. 47, ch. 238), the defendant must be personally arrested, and brought into court before the justice.

If not, a judgment rendered thereon, though upon a return regular on its face, of the defendant as in custody, and made by his consent, will be *coram non judice*, and void ; and all persons acting under it will be wrongdoers.

The confession of a judgment on the authority of a defendant, as upon a warrant, when he is not in fact arrested and brought before the court, is void.

* * * * *

CASE agreed upon at the circuit, which is sufficiently stated in the opinion of the court.

J. A. Collier, for the plaintiff.

B. D. Nowon, contra.

Curia, per SAVAGE, Ch. J. This is an action of trover for two horses and a sulky, purchased by the plaintiff at a constable's sale, upon executions issued by a justice of the peace against one Williston.

After the purchase, the defendant, a deputy sheriff, levied upon the same property by virtue of an execution against the same defendant Williston. The justice's judgments were by confession, June 7th, 1826.

The two points are raised : *First*, That the judgments before the justice, under which the property was sold, were void for two reasons ; 1. Because the defendant was not brought before the justice. * * * * *

The facts are, that one Dascomb held two notes against one Williston, and took out regularly two warrants, which were regularly served. Williston being 18 miles distant from the justice, requested the constable to leave him, and to appear for him and confess judgment as his attorney upon the notes. The constable did so. He made a regular entry upon the warrants, and appeared

for the defendant ; and judgments were entered in due form ; one for upwards of \$30, the other for upwards of \$40. The sale was made on executions issued upon these judgments. The property was duly levied on. S. Strong was the receiptor. After the property was delivered to the constable, Mr. Strong, who was attorney for the plaintiff in the execution in the now defendant's hands, asked the constable if he was going to sell on Dascomb's executions. The constable said he should keep his own secrets. Mr. Strong then gave notice to the constable and the present plaintiff, that those judgments were void for the reasons I have first stated. The property was sold, and purchased by the plaintiff. If, therefore, the judgments are void, the plaintiff had notice, and is not entitled to be considered a *bona fide* purchaser.

The most important point in this case is, whether the justice had jurisdiction of the person of the defendant Williston. The act of 1824 (6 *Laws*, 281 c, *Sess.* 47, *ch.* 238, § 4), requires that in all cases where a warrant shall issue, the constable shall be commanded to take the defendant and bring him or her forthwith before the justice, to answer the plaintiff in a plea in the same warrant to be mentioned ; and upon the defendant being brought before such justice, he shall proceed to hear and determine the cause ; and if the justice who issued such warrant shall, on the return thereof, be absent or unable to hear and try the cause, the constable serving the same shall *take* the defendant before the next justice, &c. In the next preceding section (§ 3) directions are given how to proceed in case of the defendant's appearance, or of his non-appearance ; but in the case of a warrant, there must be an appearance. In case of a summons, the officer's return of service by reading it, gives the justice jurisdiction of the person ; but in the case of a warrant, the defendant is to be *brought before the justice*. The phraseology is different. In the case of summons, the defendant *appears*, or he does not appear : in the case of a warrant, *he is brought* before the justice. No provision is made for any proceeding in his absence. It appears to me that the fair construction of the fourth section of the act, requires the defendant's *personal* appearance before the justice gains jurisdiction of his person.

I do not find that this question has been passed upon in any reported case. In *Martin v. Moss* (6 *John.* 126), the court intimate that a confession without process may be made in person or by

attorney. In such case, the voluntary appearance of the parties confers jurisdiction of the persons of the parties. The same principle governed the case of *Bromaghin v. Thorp* (15 John. 476). The case of *Sprague v. Shed* (9 John. 140), was decided upon the ground that the cause was discontinued by reason of the plaintiff's not appearing. In that case, a warrant was issued, and two defendants were taken, one of whom appeared personally. Although there seems to be no express adjudication upon this question under this statute, yet there is an adjudication under one somewhat analogous. The fourth section of the act for suppressing immorality (2 R. L. 184), gives power to a justice of the peace to convict offenders against that act. It does not provide expressly, but impliedly, that the defendant shall be present before the justice previously to a conviction being had. In the case of *Bigelow v. Stearns* (19 John. 39), it was held that a conviction without causing the offender to be brought before the magistrate was void because the justice had not jurisdiction of the person of the party convicted. That an inferior magistrate must have jurisdiction not only of the subject matter, but of the person, is there asserted and enforced, and the doctrine applied to proceedings under that statute; and Chief Justice Spencer, who delivered the opinion of the court, in conclusion, remarks, that under the 25 dollar act in a proceeding instituted by warrant, had the same facts occurred, the proceedings would have been erroneous. They would indeed have been not only erroneous, but altogether irregular and void; the officer having no jurisdiction, the proceeding is *coram non judice*. Such also is the opinion expressed by Mr. Cowen in his *Treatise*, p. 276. "Upon a warrant, the defendant is actually arrested and brought before a justice." The judgment was clearly void so far as it depended on jurisdiction to be derived from the warrant and return.

* * * * *

According to a stipulation in the case, judgment of nonsuit is to be entered, with double costs to the defendant.

Rule accordingly.

SUPREME COURT.

COLVER, APPELLANT v. VAN VALEN, RESPONDENT.

(6 How., 102. Decided 1851.)

Where requisite facts and circumstances are stated in an affidavit for an attachment, the belief that the acts set forth were done *with fraudulent intent*, should be added.

Where an affidavit is entitled in a cause and used therein, it cannot be used in another action.

Where opportunity is given to the party in the court below for objection and he remains silent, objection cannot be raised on appeal.

Stephens & Duell, for appellants.

Mr. Reynolds, for respondent.

By the Court, MONSON, Justice. I think this affidavit is not sufficient according to the decisions in 4 *Denio*, 120, and 1 *Barb. Sup. Court*, 554. The plaintiff should have added his belief that the acts set forth in the affidavit were done by defendant with intent to defraud his creditors. Belief of fraudulent intent, standing alone, is not sufficient. But I think the requisite facts and circumstances are here stated, had the plaintiff's belief been superadded.

But there was an affidavit of George Colver, upon an application by him for an attachment against the same defendant, before the justice and which he took into consideration, which stated that the defendant had departed from the county with intent to defraud his creditors, or with intent to avoid the service of any civil process, and "further says that the said James Van Valen has recently been sued by several of his creditors; that he has assigned, disposed of or secreted his property, with intent to defraud his creditors, and has refused through his agent to pay; that the store of the said James is locked, and that the said James has property concealed in a house of said Lewis Bogardus in Truxton, which is liable to execution."

I consider this affidavit sufficient under the non-imprisonment act. And it was decided at the general term in Ithaca in July 1849, in this very case, that the proceedings would be sustained if

the affidavit was sufficient under the non-imprisonment act of 1831 ; although the application was made under the revised statutes, upon the ground that the defendant had departed the county with intent, &c. The only question then is, was it proper for the justice to take this affidavit into consideration upon the application for an attachment by David J. Colver, the plaintiff in this suit.

In 14 *Meeson & Welsby*, 104, on application to a judge to hold to bail, it was decided that the plaintiff might use affidavits made and used shortly before on a similar application against the same defendant at the suit of another plaintiff entitled in the former suit and in another court.

The affidavit of George Colver was not entitled, and was made before the same court at the same time with that made by the plaintiff, and against the same defendant.

Now I can see no reasonable objection to the use made of it by the justice for the purposes of this suit. The act of 1831, § 35, p. 404, says that the plaintiff shall by his own affidavit or that of some *other person* or persons prove to the satisfaction of the justice the facts and circumstances, &c. If the objection be that after an affidavit has once been used, it becomes *functus officio*, and has lost its vitality, it may be said in the first place that it does not appear that the affidavit of George Colver had been used, and if it was first used in this suit, then the objection, if it has any force, would only affect the validity of the attachment issued in the suit of George Colver. But the idea that an affidavit from once using becomes inoperative forever thereafter, seems to me to be more fanciful than sound.

In 20 *Johnson*, 274, *Boyce v. Thompson*, and five other causes in which the names of the parties were different, notice of the rule to plead was directed to each of the defendants respectively, and an affidavit of the service entitled in all the causes was filed, and a default entered thereupon by the clerk in each cause. A question was submitted to the court whether the clerk was entitled to charge for reading and filing an affidavit in each cause. The court said the clerk was entitled to charge for making and filing an affidavit in each cause. The parties are different. The clerk must enter a default founded on an affidavit in each cause. Here the filing of one affidavit authorized the clerk to enter default in six causes of different titles and

charge accordingly. In 1 *Denio*, 682, *Schemerhorn v. Noble*, the court said that one set of papers was sufficient on which to found motions for judgment as in case of nonsuit in that and thirty-one other causes in favor of the same plaintiff against different defendants. In 6 *Cowen*, 45, *Prescott v. Roberts*, the venue was laid in the county of Onondaga and the cause noticed for trial and inquest, and defendant filed an affidavit of merits. The venue was changed by stipulation between the parties to the county of Rensselaer, where an inquest was taken on the ground that no new affidavit of merits was filed. But the court set aside the inquest saying that one affidavit extended through the whole progress of the cause; that a new affidavit need not be filed every time that the cause was noticed, and that a change of venue did not vary the principle.

The return states that in addition to the affidavit of David J. Colver, other proof was produced to the justice to entitle the said David J. to an attachment, that George Colver appeared, previous to the issuing of said attachment and made affidavit, &c. ; and the return does not state that any objection was made to the use of this affidavit by George Colver, by the attorney of defendant, who appeared on the return day of the attachment and moved to quash the proceedings. In 1 *Com.* 92, *Wright*, Justice, in delivering the opinion of the court says, where opportunity is given for objections, and none are made, but the party whose duty it is to object remains silent, all reasonable intendments will be made by a court of error to uphold the judgment. This doctrine, founded in good sense, has been promulgated in a series of decisions by the courts of this State. In the case of *Baldwin v. Calkins* (10 *Wend.*, 167), on *certiorari* the supreme court held that an omission to object will even authorize the inference of a fact necessary to confer jurisdiction. (See also the case of *Oakley v. Vanhorn*, 21 *Wend.*, 305.)

Courts have ever been disposed to exercise liberality and every warrantable intendment in order to sustain pleadings and proceedings in justices' courts. This should be applied to attachments in an especial manner, which do not admit, from the circumstances which usually attend the drawing of affidavits, of that care and leisure which parties can ordinarily bestow on other proceedings in justices' courts.

I am of opinion that the affidavit of George Colver was properly

taken into consideration in this case, and if that were questionable, that the defendant is precluded from taking the objection, because his attorney omitted to raise it before the justice when he moved to quash the attachment.

The judgment of the county court should be reversed and that of the justice affirmed.

COURT OF ERRORS.

CURTIS v. HUBBARD.

(4 *Hill*, 437. *Decided* 1842.)

A man's dwelling-house is his castle, not for his own personal protection merely, but also for the protection of his family and his property therein. *Per Walworth, chancellor.*

A defendant in an execution, by closing the outer doors of his dwelling-house against the sheriff, may prevent the latter from entering to make a levy on his goods. *Per Walworth, chancellor.*

As a general rule, no one can acquire, by his own illegal act, a right to the custody of another's person or property. *Per Walworth, chancellor.*

The outer door of a dwelling-house being *latched* merely, the sheriff entered it, contrary to the known will of the owner, and levied upon his goods therein by virtue of a *fi. fa.*: *Held*, illegal, though the owner was not in the house at the time; and that the levy gave the sheriff no right to remove the goods.

Held, further, that even a guest in the house might lawfully resist the sheriff's attempt to remove the goods thus seized, using no more force than was necessary.

The case in the *Year-Book*, 18 *E.* 4, (*fol.* 4, *pl.* 19,) commented on and explained. *Per Walworth, chancellor.*

ON error from the supreme court, where Curtis sued Hubbard for an alleged assault and battery. The court below rendered judgment in favor of the defendant, and the plaintiff brought error. For a report of the case in that court, together with the opinion there delivered, see 1 *Hill*, 336 *et seq.*

C. P. Kirkland, for the plaintiff in error.

C. Tracy, for the defendant in error.

WALWORTH, *Chancellor*. This case presents two important questions in relation to the rights and liabilities of sheriffs and other ministerial officers, in the execution of civil process. The sheriff, after being forbidden by the owner of a house, the outer door of which was shut and fastened only by the ordinary latch, entered the house for the purpose of seizing the goods of the owner upon an execution against him; the family of such owner being in the house, although he was himself outside the door. And the sheriff, having thus entered the house, seized upon and was in the act of removing a part of the goods, when the defendant in this suit, a brother of the owner, and by his direction, assisted in expelling the sheriff from the house and in preventing the removal of the goods therefrom.

The question whether the defendant in an execution had the right to close the doors of his house against the sheriff, to prevent a levy upon his property, appears to have been a matter of some doubt in England at a very early day. And Fitzherbert has a note of a case said to have been decided as early as 1325 (*Fitzherb. Abr. tit. Execution, pl. 252, H. 18 Edw. 2*), which is in favor of the right of the sheriff to enter the dwelling-house forcibly, to seize goods upon execution. No such case, however, is to be found in the *Year-Books* of that term; nor is it stated by Fitzherbert whether the execution was in favor of the king or of a private person. The question came before the court of king's bench about one hundred and fifty years afterwards (*Year-Books, 18 Edw. 4, fol. 4*), and the decision was against the right of the sheriff to break the defendant's dwelling-house with the view of levying an execution upon his goods therein. Again, in the latter part of the reign of Queen Elizabeth (1602), in the case of *Semayne v. Gresham* (*Cro. Eliz. 908, Moor, 668, Yelv. 29, S. C.*), the question was presented to the queen's bench for decision, in a suit brought against the owner of a house who had closed his doors against the sheriff, so that he could not enter to take the goods therein which belonged to the defendant in the execution. Upon the first argument, according to the report of the case by Moore, *Popham, C. J.*, and Mr. Justice *Gawdy*, relying upon the note of the case in Fitzherbert, were clearly of the opinion that the sheriff might break the door of the dwelling-house to execute the process against the goods. *Fenner* and *Yelverton*, the other two justices, being of a contrary

opinion, no judgment was then given. But a fifth judge, Mr. Justice *Williams*, being appointed in the king's bench in the first year of James the first, the case was again argued the next year; and *Williams* concurring in opinion with *Fenner* and *Yelverton*, the decision was made against the sheriff's right, as reported by Lord Coke. (*Semayne's case*, 5 *Coke*, 91.) By this decision, the right to close the outer door of the dwelling-house upon the sheriff when he came with an execution, at the suit of a private person, to levy upon goods, was placed upon the same basis as the right to prevent a similar entry when he came with like process to arrest the person of the defendant; and that appears to have been considered the settled law of England ever since. It has also been constantly recognized as the common law of the several states of the union where the English common law prevails. Nor does the fact that the defendant in the execution was not in his house at the time when the sheriff opened the door and went in contrary to his known will on the subject, alter his rights. For a man's house is his castle, not for his own personal protection merely, but also for the protection of his family and his property therein, while it is occupied as his residence.

The remaining question is whether a sheriff, who has entered the house of another in direct violation of the law, for the purpose of arresting the owner or seizing his goods, can be justified in consummating the wrong by arresting his person or removing the goods, where it is all one continuous act. I think, upon authority as well as upon principle, he cannot. And I fully concur in the opinion of the learned chief justice of Massachusetts, in the case of *Ilseley v. Nichols* (12 *Pick. Rep.* 270), upon this question. As a general rule, no person can acquire a right to the custody of the person or the possession of the property of another by his own illegal act. And I think this would never have been considered an exception to that rule, had not the language of the case cited from the *Year-Books* been misapprehended. In *Semayne's case*, either the counsel, or one of the judges who delivered the opinion of the majority of the court, is represented as saying, "by Littleton and all his companions it is resolved, that the sheriff cannot break the defendant's house by force of a *feri facias*, but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good." But that certainly could not have been

intended as a translation of the language of the case in the *Year-Book* (18th Edw. 4th). And Cowper has done great injustice to *Lord Mansfield* by quoting, as if it was his own language, a statement of that case which bears no resemblance to the note of the decision as it is in the *Year-Book*. A very fair translation of the whole case is given by Mr. Metcalf, in his note to the case of *Semayne v. Goesham* in *Yelverton*; which translation does not vary materially from that of Mr. Justice Cowen in the case of *The People v. Hubbard* (24 Wend. Rep., 371). The substance of it is, that the sheriff had an execution against a party in a civil suit, who had locked up his goods in a chest in his house; and the sheriff went and broke open the house and seized the goods and carried them off. The case being stated to the court for its decision whether the sheriff was guilty of a tort, Littleton and his associate judges held that the party injured might have a writ of trespass against the sheriff for breaking his house, notwithstanding the execution; for, as they say, "the *fi. fa.* will not excuse him of the breaking of the house, but of the taking of goods only." Not that it would excuse the sheriff for having taken the goods in this particular case, after he had wrongfully broken into the house where they were. But the words *des biens*, which, literally translated, is "of the goods," seems to have led to the erroneous conclusion that the court meant to decide that the taking of the goods in the particular case then stated to the court, was a justifiable act, notwithstanding the breaking of the house to get access to them. In the French and Norman-French languages, the article is frequently used in cases where we dispense with it. And *des*, which appears to be a contraction of the preposition *de* and the article *les*, is used where we make use of the corresponding preposition only. Thus, the English expression, "the laws of men," would, in French, be *les lois des hommes*; that is, literally, "the laws of the men."

Lord Mansfield, who seems to have taken it for granted, that in the case in the *Year-Books* the court had decided that the taking of the goods was lawful notwithstanding the illegality, intimates that he would not probably have so decided in a case of the first impression. (*Lofft*, 381; *Cowp.* 6.) And it is certain no such question could have arisen in *Semayne's case*, as no goods had been there taken by the sheriff; for it was an action against the

owner of the house for shutting his doors and refusing to permit the sheriff to enter and seize the goods. The fact also that in the subsequent case of *Yates v. Delamayne* (*Bac. Abr. tit. Execution, (N.) note*), the court set aside the levy on an execution, because the sheriff had illegally entered the defendant's house to execute the writ, is conclusive to show that it was not then considered as settled law in England that the sheriff had a right to seize the defendant's goods after having obtained access to them by his own wrongful act. That case, too, appears to have been decided in 1776, only two years after the case of *Lee v. Gansel*, and while Lord Mansfield continued to preside in the court of King's bench.

For these reasons, I think the justices of the supreme court were clearly right in deciding that if the entry of the sheriff in the present case was illegal, the defendant, acting under the direction of the owner, had a right to expel him from the house and to prevent his carrying off the goods. I therefore can see no error in the judgment of the court below, and think that judgment should be affirmed.

The President delivered an oral opinion in favor of an affirmance, and Root, *senator*, in favor of a reversal of the judgment of the supreme court.

On the question being put, "Shall this judgment be reversed?" The members of the court voted as follows:

For reversal: Senators Faulkner, Nicholas, Platt, Rhoades, Root and Works—6.

For affirmance: The President, the Chancellor, and Senators Bartlit, Bockee, Clark, Denniston, Franklin, Johnson, Paige, Ruger, Scott, and Varney—12.

Judgment affirmed.

SUPREME COURT.

Ex parte FULTON.

(7 Cowen, 484. Decided 1827.)

An appeal bond is valid, though the name of the surety be not mentioned in the body.

One executing a bond is bound by it, though he be not named in the body of it.

FULTON obtained a judgment before a justice of Steuben county, against Zimmurman, who appealed to Steuben C. P. By mistake, the appeal bond did not contain the name of the surety in the body of the bond any where; but he signed and sealed; and the bond was perfect in every other respect.

Fulton made a motion in the C. P. to quash the appeal on that ground; which was denied.

A motion was now made for a mandamus commanding the court below to quash the appeal.

Curia. The only question is, whether this bond be valid and binding on the surety without his being named in it. We think it is. It is enough in any contract, that the intent of the party clearly appear, though it be not expressed fully and particularly. A full intent to be bound by the terms of this bond is plain from the act of executing it. This view of the case is not only reasonable, but is supported by the authorities. (*Dobson v. Keys*, Cro. Jac. 261. *Smith v. Crooker*, 5 *id.* 538, 540.) Both cases cited are in point.

Motion denied.

SUPREME COURT.

WHEELOCK v. BRINCKERHOFF.

(13 *John.*, 480. *Decided* 1816.)

The security required to be given by a non-resident plaintiff, in commencing an action before a justice of the peace, by a warrant, may be a deposit of money with the justice.

And where, in an action of trespass, five dollars were deposited, as security, it was held sufficient.

IN error, on *certiorari* to a justice's court.

The plaintiff in error, who was also plaintiff in the court below, brought an action of trespass, *de bonis asportatis*, against the defendant, and, being a non-resident, the suit was commenced by warrant, on his depositing five dollars with the justice, as security. Upon the return of the warrant, the defendant inquired of the justice whether the plaintiff had given security, and was informed, generally, that he had, without stating the nature of the security. The cause was then adjourned, and, at a second meeting, the defendant inquired respecting the security, and was then told that five dollars had been deposited for that purpose. This was objected to by the defendant, and the plaintiff refusing to give other security, the justice nonsuited him. The plaintiff, afterwards, offered to give other security, but the justice decided that it was then too late.

Per Curiam. The act (1 N. R. L. 338), declares, that if a non-resident plaintiff tenders to the justice security for the payment of any sum which may be adjudged against him, he shall be entitled to have a warrant against the defendant. The nature of the security is not designated, and there can be no good reason why the deposit of money should not be deemed competent security; and if so, the sum deposited was sufficient. It was to as great an amount as could be adjudged against the plaintiff; the action being trespass, there could be no set-off, and the costs are limited to five dollars, except under some special circumstances, which we are not to intend existed in this case. The judgment must, therefore, be reversed.

Judgment reversed.

SUPREME COURT.

M'COY v. HYDE AND GRIFFIN.

(8 Cowen, 68. Decided 1827.)

Where proceedings are had, and a verdict is found for the tenant, under the statute authorizing a summary proceeding by a landlord to oust his tenant (sess. 43, ch. 194, p. 176), the original affidavit cannot be used as the foundation of a new proceeding under that act. And where it was so used, and the tenant turned out of possession, *held*, that the proceedings were *coram non judice*, and void ; and that trespass lay against both the landlord and judge.

TRESPASS ; tried at the Allegany circuit, September 26th, 1826, before Birdsall, C. Judge, when a verdict was found for the plaintiff.

A motion was made, in behalf of the defendants, for a new trial.

J. Cook, for the motion.

S. S. Haight, contra.

The facts are sufficiently stated in the opinion of the court, which was delivered by

SUTHERLAND, J. This was an action of trespass, brought by M'Coy against Hyde and Griffin, for turning him out of the possession of certain premises, which were held by him under a lease from Hyde. The defendants pleaded separately, and justified under the act of April 13th, 1820, entitled, an act to amend an act entitled an act concerning distresses, rent and the renewal of leases, passed April 5th, 1813 (sess. 43, ch. 194).

The following facts appeared at the trial: On the 25th day of April, 1826, the defendant, Hyde, made an application to the other defendant, Griffin (who was a judge of the county court of Allegany), under the act mentioned ; and made the affidavit required by the act, before Griffin. G. thereupon issued his notice to the tenant, M'Coy, the present plaintiff, to remove from the premises, or show cause before him on the 26th day of April, the next day. On that day M'Coy appeared, and, by his affidavit made

before Griffin, denied the allegations in the affidavit of Hyde, as to his holding over and not paying his rent. Griffin, thereupon, issued a venire, as required by the act. The jury appeared before him on the 27th of April; and, after hearing the proofs and allegations of the parties, found a verdict in favor of the tenant, M'Coy.

After the verdict, and on the same day, Hyde again presented the same affidavit, which was the foundation of the same proceeding, to Griffin, who thereupon issued a new notice to the tenant, M'Coy, who again appeared, and by his affidavit again denied the holding over, &c., upon which a new venire was issued by Griffin, returnable the next day, the 28th. The jury appeared, heard the cause, and found a verdict in favor of Hyde, the landlord, upon which Griffin, on the 29th, issued a warrant of restitution; upon which the plaintiff, M'Coy, was turned out of possession, and which is the trespass for which this suit was brought. The plaintiff on the trial contended that the issuing of the second notice (after the first verdict in his favor), and all the subsequent proceedings, were *coram non judice* and void. That it was a continuance of the original application, and not the institution of a new proceeding under the act, being founded on the original affidavit. That in order to authorize the issuing of a second notice, and to give the justice jurisdiction for that purpose, there should have been a new oath in writing. The judge who presided at *nisi prius* so charged the jury, who found a verdict for the plaintiff for \$300. The defendant excepted to the charge of the judge, and upon that exception the case now comes before this court.

The question is not whether the verdict of the jury in favor of the tenant, on the first trial, was a bar to any further proceedings on the part of the landlord; but admitting the right of the landlord to institute new proceedings immediately, upon a new verdict, whether such proceedings are void, as being founded on the original affidavit, again presented to the judge, but not sworn to anew. The act makes no provision for the entering of a judgment upon the verdict of the jury; but simply provides that if the verdict shall be *for the landlord*, the judge shall issue a warrant to put him into possession: but giving no directions as to what shall be done, where the verdict is for the tenant, nor declaring what shall be its effect. But it is undoubtedly the duty of the magistrate to preserve as records of the cause, the affidavits of the respective

parties. They are the pleadings out of which the issue or issues to be tried by the jury arise. These proceedings, like all other proceedings before inferior magistrates, are subject to be reviewed, and the magistrate may be called upon to make a return of every thing that took place before him. It would seem, therefore, that the affidavit of the landlord, when once made and presented to the magistrate, ceases to be under the control of the landlord; and whatever may be the issue of the cause, whether the verdict may be for him, or for the tenant, the affidavits, as pleadings, are a part of the proceeding in that cause, which it is the duty of the magistrate to preserve; and which cannot again be used by the landlord as the foundation of a new suit or proceeding under the act. If so, then the issuing of the second notice by the magistrate, and all the subsequent proceedings, were *coram non judice* and void; and the charge of the judge was correct.

New trial denied.

SUPREME COURT.

DUDLEY v. STAPLES.

(15 John., 195. Decided 1813.)

Where a person was passing through a county other than that in which he resided, and a justice of that county issued an attachment against him under the 23d section of the *act for the recovery of debts to the value of 25 dollars* (1 N. R. L. 398), the proof on which it was issued being that a warrant had been issued by the justice against the defendant, the service of which he had avoided, and a copy of the attachment was served by leaving it at a store at which the defendant had been a short time before; it was held that the provisions of the act did not apply to a case of this kind, and that the proof on which the attachment was issued, and the service of the copy, were insufficient.

IN error, on *certiorari* to a justice's court.

The proceedings in the court below were commenced by the defendant in error against the plaintiff in error, by attachment. Dudley, the defendant below, at the time when the attachment was issued, was an inhabitant of the county of Schoharie, and the justice, who issued the process, was a magistrate in Schenectady

county, and issued the attachment against the property while it was passing through that county. The justice had previously issued a warrant against the defendant, which could not be served; and it appeared that the service of a copy of the attachment was made by leaving it at the store of the plaintiff below, where the defendant had been shortly before. On the trial, the defendant appeared, and objected to the proceedings as improperly and irregularly commenced; but the motion was overruled; and the cause was tried, and judgment rendered for the plaintiff below.

Per Curiam. The principal question in this case is, whether the justice had any authority to issue an attachment. The 23d Section of the act (1 N. R. L. 398), under which the process issued, authorizes any justice of the peace, in any county, on application, and satisfactory proof by at least one disinterested witness, that any person against whom the applicant may have a demand not exceeding twenty-five dollars, hath departed, or is about to depart, from such county, or is concealed within the same, with intent to defraud any of his creditors, or to avoid being personally served with any process, &c., to issue an attachment, &c. The magistrate lived in the county of Schenectady, and the person against whom the attachment issued was a resident of the county of Schoharie. The justice returns, that the proof made before him, and upon which the attachment issued, was, that an attempt had been made to serve a warrant on the defendant below, and that he ran away to avoid such service, and that he was then absconding for the purpose of avoiding the personal service of such process. The obvious intention of the act was, to give the process of attachment against the property of a person who had absconded, or departed from his usual place of residence, and not when he might be occasionally travelling through a county; besides, the mere fact of not being able to serve a single warrant upon a traveller, who, for many reasons, might like to avoid the arrest, without being chargeable with intent to defraud his creditors, is not that kind of evidence of concealment contemplated by the act; and the provisions of the 24th section very strongly corroborate the construction, that an attachment cannot be issued in a case like the present. It is made the duty of the constable to leave a copy of the attachment at the dwelling-house, or other last place of abode of the defendant,

and the provision is entirely evaded in this case; for it is absurd to consider the store of the plaintiff, where the defendant was for a few minutes, his dwelling-house, or last place of abode. The judgment must, therefore, be reversed.

Judgment reversed.

SUPREME COURT.

Ex parte DODGE.

(7 Cowen, 147. Decided 1827.)

Where a statute declares that an act shall be done within a certain number of days, Sunday must be reckoned as one, though it happen to be the last.

E. g. in the time given for appealing by statute, *Sess.* 47, *ch.* 238, *s.* 36; the 50 dollar act.

A JUSTICE of Montgomery county rendered judgment against Dodge, at the suit of Smith, November 16th, 1826. The 26th (the 10th day after judgment), being Sunday, Dodge appealed by giving notice, &c., in due form, on the 27th. On the return coming into the C. P. in March last, they quashed the appeal, on the ground that it was made one day too late.

W. J. Dodge now moved for a mandamus commanding them to vacate the rule for quashing, &c.; and that they should proceed with the appeal.

He said the statute (*sess.* 47, *ch.* 238, *s.* 36) is, that the party shall appeal at the time of rendering the judgment, or *within ten days thereafter*. One day being exclusive, the last was Sunday. This gave us a right to appeal on Monday. Sunday being the last, is not reckoned. The statute means ten juridical days. (1 *Cowen*, 18. 2 *Salk.*, 625. 11 *East*, 271. 13 *id.*, 21. 6 *John.*, 326. 4 *T. R.* 121. 4 *Burr.* 2130.)

J. Seelye, contra, admitted that the court in its doctrines of practice, and the construction of its rules, might disregard Sunday, in the computation of time. The cases cited relate only to questions of practice. Upon this, the court makes the law for itself; and where Sunday is the last day it will not be counted.

But no cases can be found extending the same construction to a statute. Was it ever heard, for instance, that in the statutes limiting appeals to the court of errors from interlocutory orders to 15 days (1 *R. L.* 134), prosecutions under the act to suppress vice and immorality to 20 days (2 *R. L.* 197), allowing the landlord to distrain removed goods within 30 days (1 *R. L.* 437, *s.* 13), and the like cases, Sunday is not to be counted, whether it be the first or the last day? Is Sunday a blank in counting the various times for the return of process under the 50 dollar act? Cases must often have arisen, where parties would wish to avail themselves of this doctrine; but I venture to say it never was sanctioned by any court.

Curia. Sunday has, in no case, we believe, been excluded in the computation of statute time. The cases referred to, respect rules of practice. The motion must be denied.

Motion denied.

SUPREME COURT.

DAVIS v. MARSHALL AND FOLGER.

(14 *Barb.*, 96. *Decided* 1852.)

Before an attachment can be issued by a justice of the peace, against a non-resident of the county, under the 33d section of the act to abolish imprisonment for debt, a bond, such as is required by the 35th section of that act, must be given by the applicant.

If an attachment is issued without such a bond having been given, the attachment is void, and the justice issuing the same, and the party on whose application it was issued, are answerable as wrong-doers, for the execution of it.

Until the proof required by the statute is made, and the bond furnished, a justice is not invested with authority to issue an attachment. They are a condition precedent to the power which the statute gives. And if a justice undertakes to execute the power, without exacting a prior performance of these conditions, his acts are utterly void, and the process affords him no protection for what is done under it.

THIS was an appeal from a judgment entered upon the report of a referee in favor of the defendants, against the plaintiff. The

action was commenced in March, 1849, and the acts complained of took place in May, 1847. The other facts necessary to an understanding of the points decided, are stated in the opinion of the court.

John C. Strong, for the appellant.

A. T. Knox, for the respondents.

By the Court, T. R. STRONG, J. This action was brought to recover damages for the taking and detaining, by the defendants, of a canal boat, belonging to the plaintiff. The taking consisted in a seizure of the boat by a constable, by virtue of an attachment issued by the defendant Folger, who was a justice of the peace, in favor of the defendant Marshall, against the plaintiff, under the 33d section of the act to abolish imprisonment for debt, which process was delivered by Marshall to the constable, with a direction to take the boat. No bond was required by the justice, or given on issuing the attachment. It is claimed, on the part of the plaintiff, that a bond is necessary in the case — such an one as is specified in the 35th section of said act — and that none having been given, the attachment was void, and the defendants are answerable as wrong-doers for the execution of it. The decision of the court of appeals in *Bennett v. Brown* (4 Comst. 254), is conclusive in support of the first branch of this position, as to the necessity of a bond; and the conclusion contended for, from the omission to give a bond, appears to me to be, both upon principle and authority, unavoidable. The jurisdiction of a justice to issue an attachment is derived wholly from the statute, and is in all cases made, by the statute, dependent upon a compliance with certain requisites therein prescribed. Proof is to be made by affidavit, to the satisfaction of the justice, of the facts and circumstances entitling a party applying, to the same, and a bond with sureties is to be given. Until both the proof is made and the bond furnished, the justice is not invested with authority to issue the process. They are a condition precedent to the power which the statute gives. And if the justice undertakes to execute the power, without exacting a prior performance of these conditions, his acts are utterly void, and the process is no protection to him for what is done under it. This is clear,

without reference to the cases; but they place the doctrine beyond question. In *Vosburg v. Welch* (11 John. 174), a justice was held liable as a trespasser, for the taking of property by a constable, under an attachment issued by him, without any legal evidence of the facts necessary to warrant it. *Thompson*, justice, who delivered the opinion of the court says: "A mere error of judgment as to the legality of the proof offered, would not make the magistrate a trespasser, by issuing the attachment. But such proof, in order to give jurisdiction to the justice, ought at least to be colorable." And again: "The justice must be considered to have issued the attachment without any proof whatever of the departure or concealment required by the act; and of course without any authority." In *Adkins v. Brewer & Harvey* (3 Cowen, 206), it was decided that an action of trespass would lie against a justice who issued attachments, and the plaintiff therein, for a sale of property under executions, the validity of which depended upon the validity of the attachments, when no proof was given of any facts to warrant the attachments, and no security was taken, except in one of the cases. *Savage*, chief justice, says: "The defendants are called on directly, not collaterally, to show why they have undertaken to dispose of the plaintiff's property. They must then show a lawful authority. A power to act is the first thing to be shown by a court of limited and special jurisdiction." And he refers to the rule which is laid down in numerous cases, that when a justice "has no jurisdiction whatever, and undertakes to act, his acts are *coram non judice* and void—equally so as if he was not a justice. If he has jurisdiction, but errs in exercising it, then his acts are not void but voidable only. In the former case he is personally liable, in the latter not (17 John. 146. 2 John. Cas. 27. 14 John. 246. 19 *id.* 39)." In *Loder v. Phelps* (13 Wend., 46), which was an action for an assault and battery against a party, at whose suit a warrant had been issued, upon an affidavit which did not set forth any facts and circumstances showing the grounds of the application, upon which an arrest had been made, it was decided that the action was maintainable. *Sutherland, J.*, who delivered the opinion of the court, said, "The justice has no right to be satisfied with an affidavit, in the general terms employed in this case; it states no fact or circumstance whereby he could judge of the necessity or propriety of issuing the warrant; without such specification

he had no right or jurisdiction to issue the process; (3 *Cowen*, 206; 11 *John.*, 175; 12 *Id.* 257; *Cowen's Tr.* 256; 6 *Wend.*, 438; 6 *Cowen* 234;) and it can afford no protection to the defendant, who was the party who procured it." Numerous other cases might be cited, which are in point upon the principle in question, but those given are sufficient. I have not been able to find any decision to the contrary; none has been referred to on the part of the defendants. The case of *Rogers v. Mulliner* (6 *Wend.*, 597), is clearly distinguishable from the present and the cases referred to. That was an action for false imprisonment against a justice, and a party in whose favor a warrant had been issued by the former, without oath, in a case where an oath was necessary. The party was held liable, but the justice not. The ground upon which the justice was exempted from liability was, that he had general jurisdiction to issue a warrant; and that an oath was necessary only in certain cases; and that he was justified in issuing any process *within his jurisdiction* which was demanded by a party, provided he acted in good faith. The difficulty in the present case is that the magistrate had not jurisdiction. The distinction is referred to in *Barnes v. Harris* (4 *Comst.* 374). See also *Hoose v. Sherrill* (16 *Wend.*, 33, 35).

The fact that at the time the attachment was issued by Justice Folger, the late supreme court had decided that a bond was not necessary to authorize it (*Clark v. Luce*, 15 *Wend.*, 479; *Ackerman v. Finch*, *Id.* 652; *Bates v. Relyea*, 23 *Id.* 336; *Wood v. Randall*, 5 *Hill*, 264; *Van Etten v. Hurst*, 6 *Id.* 311), does not, in my judgment, affect the law in this case. The question as to the liability of either of the defendants does not depend upon what were his motives in obtaining or issuing the attachment, but only upon whether the justice had or had not jurisdiction to issue it. It is conceded that if the justice was led into error by the decisions of the supreme court, it is hard upon him to hold that he is liable. It is also hard upon the defendant Marshall, who was willing to give a bond, but was advised, by reason of those decisions, that none was necessary, to hold him liable; but it would be hard upon a party, whose property has been illegally taken, to deny him redress, from any such considerations, and I know of no principle which could justify the court in doing so. The legislature has interposed its protection against lia-

bility by any person to a penalty or forfeiture, for an act done in good faith in conformity to a construction given by the supreme court to a penal or other statute, after such decision was made, and before a reversal thereof. (2 *R. S.* 602, § 66.) But that protection is not broad enough to aid the defendants.

The conclusions to which I have come upon the questions discussed, render a consideration of other questions in the cause unnecessary.

The judgment appealed from must be reversed, and a new trial granted, with costs to abide the event.

SUPREME COURT.

Ex parte THOMAS.

(8 *Cowen*, 110. *Decided* 1828.)

An appellee plaintiff in a justice's court, though residing out of the county where the appeal is pending, is not within the general rules of a court of C. P. providing that judgment may be given against a non-resident plaintiff on his neglect to give the defendant security for costs.

THOMAS having sued and obtained judgment against Grovesteen before a justice of Montgomery county, the latter appealed to the C. P. of that county. Thomas resided in another county; and the general rules of the C. P. provided that if the plaintiff at the commencement of the suit, resided out of the county, or afterwards removed out, the defendant might, at any time before the jurors were seated in the box, obtain an order to stay proceedings till security for the defendant's costs should be given (declaring what security); and if such security should not be given within a certain time after the service of the order, the defendant might enter the plaintiff's default, and at the next term take judgment against the plaintiff.

Under these rules, the appellant proceeded to his judgment against the appellee. The latter disregarded the proceedings, and took an inquest, which the C. P. made a rule to set aside on motion.

This court were now moved for a mandamus commanding the C. P. to set aside their rule. Notice of the motion here had been served on the attorneys of the appellant.

D. Cady, for the motion.

It was not opposed, but

The Court, (after having the papers for several days under advisement) said an appellee though plaintiff before the justice, was not within the general rules of the C. P., and they ordered a Peremptory mandamus.

COURT OF APPEALS.

DECKER v. JUDSON AND OTHERS.

(16 *N. Y. Rep.*, 439. *Decided* 1857.)

The plaintiffs in replevin were required by the court, as a condition of the postponement of a trial, to renew their sureties on the bond to the sheriff, given on the institution of the suit. As a compliance with this order they procured Judson to sign the bond beneath the names of the other obligors, without the knowledge or consent of the previous sureties. The defendants in the replevin, having obtained judgment, brought an action upon the bond, in which judgment was rendered in their favor against Judson, but against them in favor of the original sureties. * * * * *

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Amasa J. Parker, for the appellant.

Francis Kernan, for the respondent.

PAIGE, J. * * * * *
* * * * *

If the bond, after its execution by Judson, was defective, inasmuch as the plaintiffs in the replevin suit caused its execution by Judson in compliance with the condition imposed by the order, and derived a benefit thereby, and as the defendant in that suit for

whose benefit Judson executed the bond, waived all objections to and accepted it, neither Nash and Gardner, the plaintiffs in that suit, nor Judson can now question its validity, nor deprive Decker of the advantages intended to be secured to him by it. (3 *Comst.*, 191.) Judson is bound by the bond although his name is not mentioned in the body of it. (7 *Cow.*, 454.) His intent to be bound by its terms is plain from the act of signing it, and he is bound, although he signed the bond without the knowledge or assent of Evans and Bennett. He executed the bond without requiring their assent; and Decker having accepted it as a compliance with the order, he is estopped from denying, as against Decker, that Evans and Bennett are liable as co-sureties with him. If, therefore, the addition of Judson's name to the bond, without their knowledge or assent, was such an alteration as discharged them from liability, it is no defence to this action. * * *

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The judgment of the Supreme Court must be affirmed.

DENIO, Ch. J. It is objected, by the counsel for the appellant, that this bond, so far as it is the obligation of the appellant, was taken to the sheriff, a public officer, in a case not provided for by law; and it is for that reason void, under the provisions of the Revised Statutes. (2 *R. S.*, 286, § 59.) It is said that, after the time allowed for excepting to the sureties in a replevin bond, the sheriff's duty in respect to it is at an end, and if any further obligation is taken in his name it is to be considered as taken illegally by color of his office, and is void by force of that section of the statute. But I am of opinion that the appellant, by consenting to execute, as obligee, a bond bearing a date anterior to the service of the process in replevin, and containing recitals showing, if true, that it was an original bond in the proceeding and was taken at a time when it was lawful and proper to take such a bond, is estopped from setting up that it was a subsequent transaction and done at a time when there could not be a legal occasion to take such a bond. It has been several times decided by the Supreme Court that a replevin bond might be amended after the service of process, and consequently after the time for taking an original bond had gone by. In these cases the amended bond must have been made to assume the form of bonds taken at the initiation of the proceed-

ing; and the sureties, by signing the amended bond or assenting to the amendment, were concluded, upon the principle I have mentioned, from disputing that the obligation was taken upon the occasion upon which, by its terms, it purports to have been taken. (*Cutler v. Rathbone*, 1 *Hill*, 204; *Hawley v. Bates*, 19 *Wend.*, 632; *Newland v. Willetts*, 1 *Barb. S. C. R.*, 20.) The new or amended bond in these cases is considered as given *nunc pro tunc*. It is not the order of the court which gives a retrospective effect to such bonds, but the assent of the obligee. The court relieves the party from his *laches* in not having procured a good bond at the proper time; but it is the general principles of law which hold the obligees to the liability which, by signing the amended bond, they intended to assume. The same principle was held in reference to an appeal bond (*Tompkins v. Curtis*, 3 *Cow.*, 251), and in regard to a bond given to procure an adjournment in a justice's court. (*Irwin v. Caryell*, 8 *John.*, 407.) In both these cases, the bonds were statutory bonds, and the new or amended obligations were allowed to be taken on the trial. They must have been made to take the form of the original obligation which was discharged upon the taking of the new one.

The appellant's execution of the bond in question was not, perhaps, in exact accordance with the order of the court. This was to renew the sureties, or that the existing sureties should justify. If the appellant's execution superseded the existing sureties, it might be well enough, considered as a renewal of the sureties. It was intended, I think, to add the present defendant to the two sureties already on the bond (*Norton v. Coons*, 3 *Denio*, 130); and it is to be inferred from the case that this was accepted by the defendant in replevin in lieu of a precise compliance with the condition upon which the court allowed the trial to be postponed.

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Judgment affirmed.

COURT OF APPEALS.

CASTELLANOS v. JONES.

(5 *New York Rep.*, 164. *Decided* 1851.)

The application and affidavits upon which an attachment against an absconding or concealed debtor is grounded, should set forth his secret departure from the State, with intent to defraud or to avoid service of civil process ; or that he keeps himself concealed therein with the like intent. The demand should be shown to be in favor of the debtor *personally*. The manner in which the demand arose should be shown; whether upon contract, upon judgment, or upon decree rendered within this state.

H. P. Hastings, for appellant.

N. B. Blunt, for respondents.

JEWETT, J. delivered the opinion of the court. The most material questions made in this case arise on the charge of the judge at the trial, and are—First, whether Judge Daly, who issued the attachment, under which the defendants justified the taking of the goods for which the action was brought, acquired jurisdiction to issue it. And second, if not, whether the want of jurisdiction appeared on the face of the process. For if the judge did not acquire jurisdiction to issue the process, and *that* appeared on its face, it furnished no protection to the defendants, or either of them, for taking the property in question.

The proceedings were attempted to be taken pursuant to the authority conferred by 2 *R. S.* p 3, § 1, *sub.* 1. To confer jurisdiction on the officer to issue the attachment under that statute, the application being made by McKinley, the creditor, should have been in writing, and have stated that the applicant resided in this state, that he was a creditor of Rodriguez, who was an inhabitant of this state, that he had a demand against him *personally*, that it arose either upon contract or upon a judgment or decree rendered within this state, specifying which, and setting forth its amount, over and above all discounts, showing that it amounted to \$100, or upwards, and that Rodriguez had secretly departed from this state, with intent to defraud his creditors, or to avoid the service of civil

process; or that he kept himself concealed within this state, with the like intent.

It should have been verified by the affidavit of McKinley, in which the sum should have been specified in which Rodriguez was indebted to him, over and above all discounts, and the grounds upon which the application was founded, and accompanied by the affidavits of two disinterested witnesses, establishing the grounds upon which the application was made.

The requirements of the statute were so far complied with, as to present the application to Judge Daly in writing, and stating in it that McKinley resided in this state, and the sum which it was claimed was owing to him, but it did not state that the debt or demand was owing from Rodriguez *personally*; or *expressly*, *how* it arose; whether upon contract or judgment or decree; it did not state that Rodriguez was an inhabitant of this state, and had secretly departed therefrom, with intent to defraud his creditors, or to avoid the service of civil process, or that he kept himself concealed therein, with the like intent.

It stated that the demand of the applicant arose "upon money received by said Rodriguez for account of deponent," and in respect to the inhabitancy of Rodriguez being in this state, and his having secretly departed therefrom, with intent to defraud his creditors, or to avoid the service of civil process, or that he kept himself concealed therein, with the like intent — it merely stated "that Joseph F. Rodriguez *formerly* residing in the city of New York, but now *absent* therefrom or concealed therein, is an absconding or concealed debtor and cannot be found;" omitting, as it will be seen, to state, either that he was an *inhabitant* of the state, or that he had *departed from the state*, or that he *kept himself concealed within the state, with intent to defraud his creditors, or to avoid the service of civil process*. It falls far short of stating the facts, upon the existence of which, and upon being stated and verified as required, the statute authorizes the issuing of an attachment.

As to the verification of the application by the affidavit of the creditor, McKinley, it is as loose and as little in conformity with the requisitions of the statute as the application is supposed to be. It verifies the sum of the indebtedness and how it arose substantially as stated in the application, and affirms that Rodriguez

is an absconding or concealed debtor, and although it states that Rodriguez was an inhabitant of this state, it does not affirm that he had *departed therefrom* with intent to defraud his creditors, secretly or otherwise, or that he had departed therefrom to avoid the service of civil process, or that he kept himself concealed within the state with the like intent.

It merely affirms that since the fourteenth of January instant the said Rodriguez had absconded (not departed from the state), or concealed himself to avoid the service of civil process (not concealed himself *within the state* with intent to defraud his creditors, or to avoid the service of civil process).

Then as to the affidavit of the two witnesses required by the statute to verify the facts and circumstances, to establish the grounds on which the application is made. It should have affirmed that the debtor was an inhabitant of this state, that he had secretly departed therefrom, with intent to defraud his creditors, or to avoid the service of civil process, or that he kept himself concealed within this state with the like intent, as the deponents believed to be true, and then showing the facts and circumstances by which their belief of the existence of the facts testified to was established. Instead of such an affidavit, the one presented to the judge with the application, affirms that the debtor had left his usual place of business and residence in the city of New York and could not be found in the city (not that he was an inhabitant of the state and had secretly departed therefrom, with intent, &c.).

It would be a violation of every principle applicable to the question of showing facts necessary to confer jurisdiction upon the officer in such cases to issue an attachment, to hold that the application and affidavits of either of them, presented to Judge Daly, for an attachment against the property of Rodriguez, were sufficient for such purpose. The attachment, therefore, issued by the judge upon the application and affidavit of McKinley was void, for want of stating facts sufficient to bring the case within his jurisdiction.

The next question is, whether the attachment on its face, shows a want of jurisdiction in Judge Daly to issue it. Instead of reciting as it should, that McKinley, the creditor, had made an application in writing to the judge for an attachment against Rodriguez, the debtor, a resident of this state, as an absconding or concealed

debtor, setting forth that McKinley was a creditor of Rodriguez and had a demand against him *personally, arising upon contract or upon a judgment or decree rendered within this state, &c.*, amounting to \$100 or upwards, over and above all discounts, and that said Rodriguez being an inhabitant of this state had secretly departed therefrom, with intent to defraud his creditors, or to avoid the service of civil process; or kept himself concealed therein with the like intent, which application was verified by the affidavit of said McKinley, and the facts and circumstances to establish the grounds on which said application was made was also verified by the two witnesses named,—the attachment omits to recite that the creditor, McKinley, had any demand against Rodriguez *personally*, or *how* the demand stated arose; whether upon contract or upon judgment or decree rendered within this state; it also omits to recite or state that Rodriguez had *secretly* or otherwise departed from the state, with intent to defraud his creditors, or to avoid the service of civil process, or that he kept himself concealed within the state with the like intent,—but merely recites that “Rodriguez has absconded from the city, or is concealed therein to avoid the service of civil process.”

The state confers no authority upon any officer or judge to issue an attachment against the property of a debtor, because he has absconded from the city of his residence, to avoid the service of civil process. Therefore, upon the face of the process the total want of jurisdiction in Judge Daly to issue it, obviously appears, and, of consequence, it afforded no protection to either of the defendants for their acts under it. The judgment must be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

SUPREME COURT.

CASE AND OTHERS V. REDFIELD.

(7 *Wend.*, 398. *Decided* 1831.)

If an officer make a false return, an action will lie against him at the suit of the party injured.

* * * * *

ERROR from the Onondaga common pleas. * * *

The defendants offered to prove that the constable who served the *attachment* in this case did not leave a copy thereof at the last place of abode of the defendant, which evidence was rejected, and the defendant excepted. * * *

* * * * *

S. L. Edwards, for plaintiffs in error.

J. Waston, for defendant in error.

By the Court, SUTHERLAND, J. The evidence offered that a *copy of the attachment* was not left at the dwelling-house, or last place of abode of the defendant, was properly excluded. The attachment was returned regularly served, and it is the return which gives jurisdiction to the justice, and authorizes him to proceed. The statute provides, *Laws of 1824*, p. 296, § 25, that on the return of the attachment, the justice shall proceed to hear, try and determine the cause in the same manner as on a summons returned personally served. If a constable makes a false return upon process, the judgment cannot be avoided on that ground; he is responsible in an action for the false return, but the return itself, whether true or false, gives jurisdiction to the magistrate, and authorizes him to proceed. 14 *Johns. R.* 481. *Cowen's Treatise*, 275.

* * * * *

Judgment affirmed with costs.

SUPREME COURT.

GILBERT v. VANDERPOOL AND BEEKMAN.

(15 *John.*, 242. *Decided* 1813.)

When process is issued out of a justice's court against an attorney or counselor, and served during the term of the court of which he is an attorney or counselor, the defendant may plead his privilege in abatement, although the process was returned after the end of the term.

A plea in abatement in a justice's court need not be verified by affidavit.

IN error, on *certiorari* in a justice's court.

The defendants in error brought an action in the court below against the plaintiff in error, who was an attorney in this court. The summons was issued during the term of this court, and was returnable on a day subsequent to the last day of term. On the return of the summons, the parties appeared, and the defendant pleaded that he was an attorney of the Supreme Court, which was sitting at the time the summons was issued and served, and claimed his exemption under the proviso in the 8th section of the *act concerning costs* (1 *N. R. L.*, 345), which takes away the privilege of an attorney or counselor, in cases of debts to the amount of 25 dollars, unless it shall appear that the court wherein he shall be such attorney or counselor shall be then sitting. The justice overruled the plea. A trial was then had on the general issue, and judgment was rendered in favor of the plaintiffs below.

PRATT, J., delivered the opinion of the court. Two questions are presented for our consideration in this case: 1. Whether the defendant below was entitled to exemption from this suit upon the facts stated in his plea; and, 2. Whether the justice was bound to receive or notice the plea in abatement, without affidavits of its truth.

On the first question, we are of opinion that according to the true construction of the 8th section of the act concerning costs, an attorney or counselor of any court of record is exempt from the service of process issued out of a justice's court, during the sitting of the court, of which he is an attorney or counselor. The term of such court may continue until the day before the return day of the summons; and then the defendant would have only one instead

of six days, to prepare for his defence; the legal intendment being that the attorney or counsel is occupied exclusively in the business of the term during its continuance. The statute has modified the common law privilege, by subjecting attorneys and counselors, during vacation, to the jurisdiction of justices; but the effect of the proviso is to leave them completely under the protection of their common law privileges during the terms of their courts.

On the Second question, also, the opinion of the court is in favor of the defendant below. The 23d Section of the *act for the amendment of the law* (1 N. R. L. 524), requiring dilatory pleas to be verified by affidavit, is expressly made applicable to courts of record only. A justice's court, in the sense of that statute, is not a court of record. The statute says "that no dilatory plea shall be received in any court of record, unless the party offering such plea do, by affidavit, prove the truth thereof, &c." This is said in reference to the practice of all courts of record of receiving written pleas, in vacation or in term, by filing them in the clerk's office, and has no reference to a justice's court, where the pleadings are generally *ore tenus*, and are never required to be in writing, and where the pleadings are always in open court. That a defendant might make an oral plea in abatement, and yet be required to verify it by an affidavit, that is, an oath in writing, was never intended by the legislature. A plea in abatement in a justice's court, like every other plea, must be proved, unless admitted; and in this case the trial and proof of all disputed facts was immediately to follow the plea. The reason, therefore, for requiring an affidavit to verify a dilatory plea, in courts of record, does not apply to a justice's court. In the one case, the effect of a plea in abatement, if frivolous, is to delay a trial on the merits, for a term at least; in the other case, the plea in abatement, and the plea on *respondeas ouster*, are all tried at the same sitting. Besides, the affidavit (if any were necessary) was waived in this case, as the plaintiffs made no objection to the plea on that ground. The plaintiffs and the justice seem to have put the cause on the single point, that, as the return day of the summons was after the term of the Supreme Court the attorney was amenable to the justice's court, although the process was issued and served during the term. On that point the justice erred and the judgment for the plaintiff's, below ought to be reversed.

Judgment reversed.

SUPREME COURT.

LYNDE v. MONTGOMERY.

(15 *Wend.*, 461. *Decided* 1836.)

An *attachment* issued by a justice against a debtor, keeping himself concealed to avoid the service of process, is not supported by an affidavit that he keeps himself concealed to avoid the service of a warrant issued under the fourth section of the act to *abolish imprisonment*, &c., unless it *affirmatively appear* that he was charged only with an *intent to commit a fraud*, or with *fraudulently contracting the debt*; unless it so appear, as the process may be *criminal*, it consequently is not shown that he concealed himself to avoid the service of *civil* process.

ERROR from the Cortland common pleas. Lynde sued out an *attachment* against Montgomery from a justice's court, on the ground that Montgomery kept himself concealed to avoid the service of process. The *affidavit* upon which the attachment issued, after setting forth the indebtedness of Montgomery, stated that the applicant for the attachment took out a warrant, under the third section of the act to abolish imprisonment for debt and to punish fraudulent debtors, passed April 26th, 1831, and that he, with the sheriff of the county, went to the place of residence of Montgomery, to arrest him on the warrant, and that Montgomery kept himself concealed to avoid service of the process. On this affidavit, the justice issued the attachment which was served, and subsequently judgment was rendered in favor of Lynde against Montgomery. The common pleas of Cortland, on *certiorari*, reversed the justice's judgment, and the plaintiff sued out a writ of error.

A. Donnelly, for plaintiff in error.

J. Thomas, for defendant in error.

By the Court, SAVAGE, Ch. J. To justify the issuing an attachment in this case, the plaintiff should have proved that the defendant kept himself concealed with the intent to avoid the service of *civil process*. 2 *R. S.* 230, § 26. The question, therefore, is whether the warrant upon which an attempt was made to arrest the defendant, and to avoid which arrest he kept himself concealed,

was *civil* or *criminal process*. It is argued in support of the judgment of the common pleas, that one object of the statute is to punish fraudulent debtors; that the warrant issues in the name of the people of the State; that the person arrested is to be examined, and if found guilty is to be committed to jail; and when committed, is to remain in custody in the same manner as *other prisoners on criminal process*, until he shall have done certain acts, if judgment passes, or has passed against him. This warrant may issue by the 4th section of the act to abolish imprisonment &c. (*Session Laws of 1831, p. 396, &c.*), in four cases: 1. When the defendant is about to remove his property, &c., with intent to defraud his creditors; 2. When he fraudulently conceals rights in action, or refuses to apply them, or stocks, money or evidences of debt, in payment of a judgment in favor of the complainant; 3. When he has assigned or removed, or disposed of any of his property, or is about to do so, with intent to defraud his creditors; or 4. When the defendant fraudulently contracted the debt respecting which such suit is brought. By section 26, the removal of property, by the owner, out of the county, to prevent a levy upon it by virtue of an execution, and the disposal of his property in any manner with intent to defraud any creditor, or to prevent such property from being liable for the payment of his debts, is declared a misdemeanor. The 1st and 4th grounds for issuing a warrant under section 4, are not embraced within section 26; the warrant may therefore issue where it seems to be intended as a mere civil remedy to compel payment of a debt. By section 10, the person arrested shall not be committed to jail, if he shall comply with either of five alternatives there mentioned, all of which relate to payment of, or giving security for the *debt*, on account of which he has been arrested. The process, however, is in the form of *criminal process*. It assumes that the people have cause of complaint; and proceeds on the ground of a fraud either intended or committed. The defendant, when arrested is to be treated like a person arrested on criminal process; and in section 11, it is declared that when committed, he "shall remain in custody in the same manner as *other prisoners* on criminal process," &c. The word *other*, as here used, seems to express the sense of the legislature, that the person so imprisoned is imprisoned on criminal process. If the charge upon which the attempt was made to arrest

the defendant below, was that of removing or disposing of his property with intent to defraud his creditors, then the process was clearly criminal in all respects; if the charge was an intent only to commit a fraud, or that a fraud was committed in originally contracting the debt, the defendant could not be punished criminally upon any proceeding founded upon that process. But as the proceeding is in the name of the people—as the defendant, when arrested, is to be treated as a criminal offender—and as the eleventh section considers him a prisoner on criminal process, in my opinion the process should be so considered. To sustain the attachment it should have appeared *affirmatively* that the process was a civil process. If I am right in this, then the common pleas decided correctly, and their judgment should be affirmed.

NEW YORK COMMON PLEAS.

MICHAEL COONEY v. HOWARD WHITFIELD.

(41 *How.*, 6. *Decided* 1871.)

It is not necessary that the facts stated in the affidavit for an attachment should be decisive of a design on the part of the debtor to assign or dispose of his property with the intent to defraud his creditors. It is sufficient if they legally aim or tend, to sustain that averment.

THIS is an appeal from a judgment rendered by a justice of the eighth district court of the city of New York, vacating an attachment under the act of 1831, with costs.

David McAdam, for plaintiff, appellant.

H. D. Lepaugh, for defendant, respondent.

LOEW, J.—I think the justice erred in vacating the attachment. The affidavits upon which he allowed the same, showed that the defendant was indebted to the plaintiff in a specified sum, over all payments and set-offs, for money loaned and work done; that the defendant, had a short time before purchased his stock of goods

amounting to about \$1,000, mainly on credit; that he was rapidly selling the same off at about cost; that he had no other property; that he borrowed money of several parties, whose names were given, and while refusing to repay it, he was endeavoring to borrow more; that he was indebted to numerous persons who were named, and whom he refused to pay; and that although he had money constantly coming in, he retained the same, and neglected and refused to pay his men, but kept putting them off from time to time, under various pretexts.

It further appeared that when the plaintiff requested the defendant to pay him, the latter held up a handful of bills and told the former not to ask him for money, as he did not owe him one cent, and at another time he said that he would never pay him, and speaking about failing, he remarked, that he would not fail for a few hundred dollars; but when he did so, he would fail heavy, as he intended to make something.

It seems to me, that all these facts and circumstances taken together, furnished while uncontroverted, sufficient evidence upon the point of the defendant's fraudulent intent, respecting the disposition of his property, to uphold the attachment.

It is not necessary that the facts stated in the affidavit should be decisive of a design on the part of the debtor to assign or dispose of his property with the intent to defraud his creditors.

It is sufficient, if they legally aim, or tend, to sustain that averment. (*Talcott v. Rosenberg*, 8 Abb., N. S., 287, and the cases there cited.)

The judgment of the court below should be reversed. *Robinson* and *J. F. Daly JJ.*, concurred.

SUPREME COURT.

NEAR v. A. M. & L. VAN ALSTYNE.

(14 *Wend.*, 230. *Decided* 1835.)

It is competent for a justice to amend an attachment issued by him, by inserting after the return of the process the amount of the debt sworn to by the applicant.

ERROR from the Madison common pleas. Near commenced a suit by attachment against the defendants. On the return day of the process, the defendants appeared and objected that the *amount of the debt sworn to by the applicant* was not stated in the attachment, 2 *R. S.* 230, § 30, and prayed that the suit abate. The justice, instead of granting the motion, *amended* the process by inserting the words *fifty dollars* as the sum sworn to, and proceeded to hear the proofs of the plaintiff (the defendant refusing to appear), and rendered judgment in favor of the plaintiff. The common pleas of Madison, on *certiorari*, reversed the justice's judgment. The plaintiff sued out a writ of error.

S. Chapman, for plaintiff in error.

J. Benedict, for defendant in error.

By the Court, SAVAGE, Ch. J. By the construction given by this court, in *Brace v. Benson*, 10 *Wend.*, 214, to the revised statutes, 2 *R. S.* 424, 5, and 225, it was held that justices have the power of amendment, in the same manner as courts of record before judgment. The amendment made by the justice was clearly such an one as it became his right and duty to make. The provision requiring process to be filled up before issuing, 2 *R. S.* 267, § 233, was intended to guard against the abuse which at one time was but too common. Justices put blank process into the hands of constables and others, to be filled up by them as they saw fit, in the same manner as attorneys in courts of record issue process. To such cases the statute is applicable, but does not interfere with the power of amendment in clerical mistakes, in process issued properly by the justice himself.

The common pleas erred, and the judgment must be reversed.

Judgment reversed.

SUPREME COURT.

REED v. DRAKE.

(7 *Wend.*, 345. *Decided* 1831.)

* * * * *

Where an obligor signs his name and affixes his seal in the space between the penal part of the bond and the condition thereof, the condition is as much a part of the instrument as if the signature was at the foot of it.

D. B. Shepherd, for plaintiff in error.

D. M. Frye, for defendant in error.

By the Court, NELSON, J. The bond offered in evidence by the plaintiff was signed and sealed before the condition, immediately after the penal part of the bond, and the reading of the condition was objected to as being no part of the bond. In the stage of the trial when the objection was made, the proof of the condition was immaterial, and if the objection was sound, the evidence was complete to support the declaration; but if the condition was material, the proof of its execution and delivery was sufficient. The subscribing witness swore that mutual bonds, of which this was one, were executed and delivered by the parties, in pursuance of an agreement to submit to arbitrators certain matters in difference. The condition to each bond was to abide by the award to be made by them, and that the condition was written and read as a part of the instrument at the time of the execution and delivery. The condition was as much a part of the instrument as if the signature had been at the foot of it. The objection that there was a variance between the declaration and bond, as the condition was not set out, is obviously too untenable to require notice.

When the plaintiff rested, the defendant's counsel moved for a nonsuit, on the ground that, as there was a condition to the bond for the performance of covenants, the plaintiff was bound to assign breaches before any damages could be assessed by the jury. It is true that the jury could not assess damages upon a breach not assigned according to the requirements of the statute, still, as the

execution of the bond was proved, the plaintiff would be entitled to *nominal damages*, and the court was therefore right in refusing to nonsuit him. *Hodges v. Suffett*, 2 *Johns. Cas.* 407.

* * * * *

SUPREME COURT.

JOHN CONROY AND OTHERS v. THE NATIONAL PROTECTION INSURANCE COMPANY.

(10 *How.*, 403. *Decided* 1855.)

A corporation must be deemed to have a residence, and its place of business is its place of residence.

A. Pond, for the motion.

Mr. Beardsley, opposed.

BOCKES, Justice. * * * * *

The important question on this motion is, whether a corporation can be deemed to have a *residence*. In law they are regarded as persons, and are treated for many purposes as citizens and inhabitants. (*Louisville & R. Co. v. Letson*, 2 *How.*, 497; *The People v. The Utica Ins. Co.*, 15 *John.*, 358, 382; *Ontario Bank v. Bunnell*, 10 *Wend.*, 186; *Sherwood v. Sar. & Wash. R. Co.*, 15 *Barb.*, *S. C. R.*, 650.) Corporations must be deemed to be persons, in order to secure an equal distribution of the burdens of government, from which they, in common with individuals, receive advantages.

The same necessity demands that they should be deemed to have a residence. It has been decided that a foreign railway company may be compelled to give security for costs, as an absent or non-resident plaintiff. (*Limerick & Waterford Railroad Co. v. Fraser*, 4 *Bing.*, 394; *Edinburgh & Leith Railroad Co. v. Dawson*, 3 *Jurist*, 55; *Kilkenny Railroad Co. v. Fielding*, 2 *Eng. Law & Eq. R.* 388.) In the *Bank of the U.*

States v. M'Kenzie (2 *Brockenborough*, 395), it was held that the corporation had a residence, and located it at Richmond; and in *Louisville & R. Co. v. Letson* (2 *How.*, *U. S. Rep.*, 497), it was decided that the Company was a citizen of the State which created it; and in *Cromwell v. Charleston Ins. Co.* (2 *Richardson*, 512), the court held the corporation to be within the operation of a statute giving jurisdiction to the city over *persons residing* within its territorial limits. (See also *The People v. The Trustees of Geneva College*, 5 *Wend.*, 211.) These authorities proceed, too, on the ground that the place of business of a corporation is its residence. In *Glazie v. S. C. Railroad Co.* (1 *Strobhart*, 70), the court remark, that the residence of a company is most obviously where it is actively present in the operations of its enterprise. *Allen v. The Pacific Ins. Co.* (21 *Pick.*, 257), is not an authority in the questions under discussion. In that case the plaintiff was a non-resident, and by the law of that State (Mass.) a plaintiff living out of the State might bring his action in any county. His non-residence gave him the right to select the place of trial. But by § 125 of the Code, the proper county for the trial of this action is that in which the parties, or some one of them, reside at the commencement thereof.

The plaintiffs were non-residents of the State—hence the decision of this motion depends upon the question in regard to the defendant's residence; and the conclusion arrived at is, that a corporation must be deemed to have a residence, and that its place of business is its place of residence.

It has been adjudged, upon principles of justice and equity, that corporations were, in law, to be regarded as persons, citizens, and inhabitants. The same considerations demand that their place of business should be deemed their place of residence. Then their rights, privileges, duties, and obligations will closely approximate to those of natural persons, and many perplexities in the administration of justice will be obviated.

The motion must be granted.

SUPREME COURT.

HAIGHT v. TURNER.

(2 John., 370. Decided 1807.)

An affidavit on which a motion is founded for a mandamus to a court of common pleas, must not be entitled. * * * * *

* * * * *

Fisk, in behalf of the defendant, moved for a mandamus to be directed to the judges of the court of common pleas of the county of Orange, commanding them to give judgment in this cause, then pending before them. He offered affidavits of the facts on which his motion was founded, and which were entitled *Ruben Turner adsm. James Haight*.

J. Hamilton, for the plaintiff, objected to the reading of the affidavits, because they were wrongly entitled.

The Court said, that *Fisk* might read the affidavits, and they would afterwards consider the formal objection.

* * * * *

Per Curiam. It is a settled rule of practice in the English courts, that on a motion for an information, or in an affidavit to hold to bail, the affidavit must not be entitled, and if it be entitled, it cannot be read. The reason assigned is, that there is, *at the time*, no cause pending in the court, and an indictment for perjury, in making such an affidavit, must fail, as it could not be shown that such a cause existed in the court in which the affidavit was made. The present case comes within the reason of the English rule. The cases of *Brooke v. Ewer*, and *Bayley v. Broome*, cited from *Strange*, prove nothing on this point, as the reporter might have taken the title of the cause elsewhere. The affidavits, therefore, cannot be received. But on the merits, the court would have sustained the motion. The alleged ground of irregularity was a mere pretext, and if it were allowed to prevail, the courts of common pleas might grant new trials in every case, and the provisions of the statute be thereby defeated. The verdict below was set aside as being against evidence. The writ of *mandamus* is the proper remedy in this

case. (*Strange*, 113. 392.) But as the affidavits ought not to have been entitled, they cannot be received, and the motion must, therefore, be denied.

Rule refused.

SUPREME COURT.

CASE V. SHEPHERD.

(2 *Johns. Cases*, 26. *Decided* 1800.)

Where a justice, after a *certiorari* from this court was delivered to him, proceeded to try the issue of traverse on an indictment under the act to prevent forcible entries and detainers, and the defendant being found guilty, the writ of restitution was issued, and the defendant turned out of possession, it was held, that the proceedings of the justice, after the *certiorari*, were *coram non judice*, and void, and that the justice was liable to an action of trespass.

* * * * *

THIS was an action of trespass *quare clausum fregit*, for treading down the plaintiff's grass, and cutting and carrying away wheat, rye, oats, &c. from his close, &c. Plea not guilty. The cause was tried, at the Rensselaer circuit, before Mr. Justice Benson.

The defendant was a justice of the peace ; and in July, 1797, the plaintiff was indicted before him under the act to prevent forcible entries and detainers. The plaintiff pleaded to the indictment, but before trial of the traverse, he obtained a *certiorari* from this court, to remove all the proceedings, which he delivered to the defendant, who, notwithstanding, proceeded to try the issue, on which the present plaintiff was found guilty. The defendant, thereupon, issued a warrant of restitution, in the usual form, to the sheriff of the county, by virtue of which the plaintiff was turned out, and one Bull put into possession of the premises.

The plaintiff offered to prove that, at the time Bull was put into possession, there were crops of wheat and rye, growing on the premises, which were reaped by him and converted to his own use. The defendant objected to this testimony, but the objection was overruled by the judge, and the evidence admitted. The plain-

tiff proved that Bull reaped about 200 bushels of rye, and 400 bushels of wheat, and the jury, thereupon, found a verdict for the plaintiff for 265 dollars damages.

A motion was made to set aside the verdict, and for a new trial.

Emott, for the plaintiff.

Woodworth, for the defendant.

Per Curiam. There can be no doubt that the delivery of the certiorari to the justice, superseded his powers, and rendered all subsequent proceedings before him *coram non judice*, and void. (a) (*Cro. Car.* 261; 1 *Salk.* 352.) The act requiring bail in certain cases (11 *Sess. c.* 2, s. 4), upon *certioraris*, does not apply to the case of an indictment before a justice, under the statute of forcible entry and detainer; for it is not a judgment or order within the meaning of the act.

As the magistrate holds a court of a special and limited jurisdiction, and proceeded after his power was taken away by the *certiorari*, he became a trespasser, and is liable as such. (b) (*Comy.*

(a) It is clearly settled, that when a *certiorari* is received by the court below, it operates as a *supersedeas*, and all subsequent proceedings on the record are erroneous. *Bac. Abr. tit. Certiorari, G. Com. Dig. Certiorari, E. Cross v. Smith*, 12 *Mod.* 643. *Reg. v. Nash*, 2 *Ld. Raym.* 989. See the opinion of *Savage, Ch. J. in Patchin v. Mayor, &c. of Brooklyn*, 13 *Wend.*, 664, 665, 666. *Payfer v. Bissell*, 3 *Hill*, 239. *Gardner v. Murray*, 4 *Yeates*, 560. *Kingsland v. Gould*, 1 *Halst.* 161. *Muir v. Sparks*, 2 *Southard*, 513. Though where an execution is in process of being executed, it is not superseded by the allowance and delivery of the *certiorari*. *Regina v. Nash*, cited *supra*. *Meriton v. Stevens*, *Will.* 271. *Blanchard v. Myers*, 9 *Johns. R.* 66. *Payfer v. Bissell*, cited *supra*. See also *Wilson v. Williams*, 18 *Wend.*, 581; also 1 *Cowen*, 21. It has been held, however, in Pennsylvania, that a *certiorari* to remove the proceedings of justices under the landlord and tenant law of that state, is not a *supersedeas* to an execution. *Anon.*, 4 *Dallas*, 214. *Stewart v. Martin*, 1 *Yeates*, 49.

(b) Where a court has jurisdiction of the cause, *Le case del Marshalsea*, 10 *Co.* 76, a., and proceeds *inverso ordine*, or erroneously, an action does not lie against the court, the party who sues, or the officer or minister of the court who executes the precept or process. *Easton v. Calendar*, 11 *Wend.*, 91. *Hurst v. Wickwire*, 10 *id.* 102. *Horton v. Auchmoody*, 7 *id.* 200. *Curry v. Pringle*, 11 *Johns. R.* 444. *Smith v. Shaw*, 12 *id.* 257. *Yates v. Lansing*, 5 *id.* 282; 9 *id.* 395. *Reynolds v. Cock*, 3 *Caines' R.* 267. *Moor v. Ames*, *id.* 170. *Reynolds v. Church*, *id.* 274. *Reynolds v. Orvis*, 7 *Cowen*, 269. *Cunningham v. Bucklin*, 8 *id.* 178. *Van Sternbergh v. Kortz*, cited *infra*. *Bigelow v. Stearns*, 19 *Johns. R.* 3. *Caleb v. Cooper*, 15 *id.*

Rep. 81. 2 *Black. Rep.* 1145, 1035. 1 *Burr.* 596, 602. 8 *Co.* 114, 121. *Str.* 710, 993. *Cowp.* 640, 647. 1 *Lord Raym.* 454, 468, 470.)

* * * * *

New trial granted.

152. *Butler v. Potter*, 17 *id.* 145. *Vosburg v. Welch*, 11 *id.* 175, 177. *Steph. N. P.*, *Sharswood's ed.* 2019. *Brodie v. Rutledge*, 2 *Bay*, 69. *Ambler v. Church*, 1 *Root*, 211. *Phelps v. Sill*, 1 *Day*, 315. *Young v. Herbert*, 2 *N. & M' Cord*, 368. *Reed v. Hood*, *id.* 168. *Ely v. Thompson*, 3 *Marsh*, R. 76. *Little v. Moore*, 1 *South*. 74. See *Tracy v. Williams*, 2 *Conn.* R. 113. *Evans v. Foster*, 1 *N. Hamp.* R. 374. See also 2 *Bay*, 1. *Harper*, 66. *Ross v. Rittenhouse*, 2 *Dallas*, 160. 1 *Yeates*, 443. But if the court have not jurisdiction of the cause, the whole proceeding being *coram non judice*, an action will lie against them. *Nicols v. Walker*, *Cro. Car.* 395. *Hill v. Bateman*, *Str.* 711. *Shergold v. Holloway*, *id.* 1102. *Perkin v. Proctor*, 2 *Wils.* 384. *Brown v. Compton*, 8 *T. R.* 524. *Wickes v. Caulk*, 5 *Har. & J.* 42. *Griffith v. Frazier*, 8 *Cranch*, 9. *Den v. Harnden*, *Paine*, 55. Hence where one of the bail had been arrested by process out of the Marshal (*Le case del Marshalsea*, cited *supra.*), for the purpose of satisfying a judgment obtained against a principal, in a cause of which the Marshalsea court had no jurisdiction, it was holden that an action for false imprisonment would lie against the party who sued, the marshal who directed the execution of the process, and the officer who executed the same. If, therefore, a magistrate commit a party where he has no jurisdiction, he is liable to an action of trespass. *Case v. Mountain*, 1 *M. & G.* 227.

Public policy demands that courts of inferior jurisdiction should be strictly estrained within the limits of their jurisdiction, and the law accords with this principle. It must, therefore, appear on the face of their proceedings that they acted within their limits, or such proceedings are *coram non judice* and void. The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court, but that which is so expressly alleged. *Peacock v. Bell*, 1 *Saund.* 73. Per Cowen, J. in *Hart v. Seizias*, 21 *Wend.*, 40, 46, *et seq.* Per Bronson, J. in *Bloom v. Burdick*, 1 *Hill*, 130, 139. *Foot v. Stevens*, 17 *Wend.*, 483. *Kemp v. Kennedy*, 5 *Cranch*, 172. *Pet. C. C. R.* 36. *Albee v. Ward*, 8 *Mass. R.* 86. *Walbridge v. Hall*, 3 *Verm. R.* 114. *Smith v. Rice*, 11 *Mass. R.* 513. *Williams v. Blunt*, 2 *Mass. R.* 213. *Turner v. Bank of America*, 4 *Dallas*, 11. *Hunt v. Hapgood*, 4 *Mass. R.* 122. *Clapp v. Beardsley*, 1 *Aik.* 168. *Martin v. McKinney*, *Pr. Dec.* 380. *Hall v. Howd*, 10 *Conn. R.* 514. *Hendrick v. Cleveland*, 2 *Verm. R.* 329. *Powers v. People*, 4 *Johns. R.* 292. *Hamilton v. Burum*, 3 *Yerg.* 355. *Latham v. Edgerton*, 9 *Cowen*, 227. *Stockett v. Nicholson*, *Walker*, 75. *Wooster v. Parsons*, *Kirby*. 27. *Wickes v. Caulk*, 5 *Har. & J.* 36. *McKenzie v. Ramsey*, 1 *Bailey*, 459. *Harvey v. Huggins*, 2 *Bailey*, 267. See 2 *Overt*. 215. *Den v. Turner*, 9 *Wheat.* 541. *Hill v. Pride*, 4 *Call.* 107. In the case of *Miller v. Seare et al.* 2 *Wm. Black.* 1141, 1145, De Grey, Ch. J. observes:—"In courts of special and limited jurisdiction, having power to hear and determine, a distinction must be made. While acting within the line of their authority, they are protected as to errors in judgment; otherwise they are not

protected. So in Dr. Bonham's case, false imprisonment lay, because they had exceeded their authority. In Dr. Groenvelt's it did not lie, because they were within their jurisdiction. In Dr. Bouchier's case, and the case of Terry & Huntingdon in Hardres [p. 480; cited 12 Mod. 392], it lay because of the excess of jurisdiction. Thus much of *courts*. The case is stronger, when applied to single magistrates, having or not having jurisdiction. [See this subject fully discussed in *Perkin v. Proctor*, 2 Wils. 384. See also *Brittain v. Kinnaird*, 1 Brod. & B. 432; 4 B. Mo. 50, and cases there referred to. *Milward v. Caffin*, 2 Wm. Bl. 1330.] In all cases where protection is given to the judge giving an erroneous judgment, he must be acting *as judge*. The protection, in regard to the superior courts, is absolute and universal; with respect to the inferior it is only while they act within their jurisdiction." See *Dr. Bouchier's case*, considered by Spencer, J. in *Van Sternbergh v. Kortz*, 10 Johns. R. 167, 170. Where, therefore, no jurisdiction to do a particular act is shown by an inferior tribunal, the officer doing it is subject to an action, if it result in an injury to the property or person of any one. *Adkins v. Brewer*, 3 Cowen, 206. If void process be issued, even though no malice enter into the act, trespass will lie, not only against the plaintiff, but also against the magistrate. *Id.* Per Jackson, J. in *Hayden v. Shed*, 11 Mass. R. 500. *Smith v. Rice*, *id.* 507. Sedgewick, J. in *Albee v. Ward*, 8 *id.* 79. *Van Sternbergh v. Kortz*, *ut supra*. *Kennedy v. Terrill*, *Hardin*, 490. See *Prince v. Thomas*, 11 Conn. R. 472. As where a justice (in Massachusetts) issued an execution, within two or three hours after judgment was entered up, though by the statutes of 1783, c. 58, § 1, and 1784, c. 28, § 15, it was provided that the execution should not issue in any case until after the expiration of twenty-four hours after the entering up of judgment, *Briggs v. Wardwell*, 10 Mass. R. 356; or a warrant against the plaintiff as the father of a bastard child, though no complaint had been made to authorize it, *Poult v. Slocum*, 3 Blackf. 421; or an execution for costs under which the plaintiff's horse was sold, without jurisdiction. *Rembert v. Kelly*, *Harper*, 65. See the judgment of Marcy, J. in *Savacool v. Boughton*, 5 Wend. 170. Also *Borden v. Fitch*, 15 Johns. R. 121. *Prigg v. Adams*, 2 Salk. 674. *Griffin v. Mitchell*, 2 Cowen, 548. Also the judgment of Nelson J. in *Easton v. Callendar*, 11 Wend., 90.

SUPREME COURT.

ROGERS v. MULLINER & MOORES.

(6 *Wend.*, 597. *Decided* 1831.)

A justice of the peace is not liable in an action for *false imprisonment* for issuing a *warrant without oath* against a freeholder, where it is not shown that he acted *mala fide*.

THIS was an action for *false imprisonment*, tried at the Orange circuit in April, 1829, before the Hon. James Emoth, then one of the circuit judges. The declaration was in the usual form, and the defendants severed in their defence.

The plaintiff was arrested on a *warrant*, issued under the *fifty dollar act*, by Moores as a justice of the peace, at the suit of Mulliner. No *summons* had been previously issued, nor was the warrant issued on an *oath* that the defendant was about to depart from the county, or that the plaintiff would be in danger of losing his debt, unless the process against the defendant was by warrant. The plaintiff here (the defendant below), on being brought before the justice, inquired whether the warrant had been issued on oath; and on being told that it was not so issued, he informed the justice that he was a *freeholder*, objected to the regularity of the proceedings, and claimed to be discharged. The justice immediately discharged him. The plaintiff in the proceeding, on the day before the constable received the process, told him that he intended to take out a *warrant*, and made the necessary arrangements for the constable to receive it. On the trial of the cause at the circuit, the plaintiff in this suit proved that he was a *freeholder* of the county where he was arrested, for some time previous to his arrest on the warrant. The jury, under the charge of the judge, found a verdict against *both* defendants, and the counsel for the parties entered into a stipulation that if this court should be of opinion that the defendants, or *either* of them, were not liable to the action of false imprisonment, the verdict should be amended accordingly; otherwise judgment be entered against the defendants.

J. W. Brown, for the plaintiff.

D. Ruggles, for the defendants.

By the Court, SAVAGE, Ch. J. It is conceded that the defendant, Mulliner, is liable in this action, but it is contended that the justice is not; and whether he is or not is the question. When the case of *Percival v. Jones*, 2 *Johns. C.* 49, came before this court, it was laid down as a general proposition, that "In courts of special and limited jurisdiction, the rule is strict that the party becomes a trespasser who extends the power of the court to a case in which it cannot lawfully be extended." Several cases are referred to in support of the doctrine, which is undoubtedly correct. The difficulty in its application in this case is, to ascertain who is the party who undertakes to extend the power of the court. In another part of the opinion of the court in the case of *Percival v. Jones*, the court say: "Mere ministerial officers, who, as such, issue or execute process, cannot, nor ought to be responsible, as long as the court from which it issues has general jurisdiction to award such process. But the party who sues out the process, does it at his peril, and he is responsible."

The *Marshalsea case*, 10 *Co.* 76, 77, contains this doctrine in relation to the liability of those who extend the jurisdiction of inferior tribunals: That where the subject matter of a suit is not within the jurisdiction of the court applied to for redress, everything done is absolutely void, and the officer executing the process is a trespasser. But where the subject matter is within the jurisdiction of the court, but the want of jurisdiction is as to the person or place, unless the want of jurisdiction appears on the face of the process, the officer who executes it is not a trespasser. 2 *Esp. N. P.* 390, 1. So in 20 *Vin. Abr.* 480, *Trespass, C. a. pl.* 19, 20, if an officer intermeddles in, or does nothing but what belongs to his office, he is not liable for precedent tortious acts. If an action be brought in an inferior court, for a matter which does not arise within its jurisdiction, and the defendant be arrested thereupon, yet no action will lie against the officer who arrested him, though it will against the plaintiff; and the case of *Hudson v. Cook, Skin.* 131, is referred to, and supports the doctrine as stated by Viner.

The case of *Hill v. Bateman et al.*, 1 *Str.* 710, was brought against a justice and constable. Bateman had convicted the plaintiff for destroying game, and had imprisoned him, though the plaintiff had goods sufficient to have paid the penalty, and which might have been distrained. Lord Raymond, chief justice, held

that the action would lie against the justice, but not the constable, because the warrant was in a matter within the jurisdiction of the justice; but if a justice of the peace makes a warrant in a case which is plainly out of his jurisdiction, such warrant is no justification to a constable. The justice was held responsible, because it was his duty first to have distrained the goods of the person convicted, as I infer from the report. It does not interfere with the principle of *Percival v. Jones*. There must be a jurisdiction of the process as well as of the person and cause, 2 *Wils.* 386; and an action was adjudged to lie against the vice chancellor of Oxford, *Smith v. Bouchier et al.*, 2 *Str.* 993, 4, who had issued a warrant upon a defective oath. He was not authorized to issue a warrant, unless the plaintiff swore that *he believed* the defendant would run away. The plaintiff swore that he *suspected* the defendant would run away, and the plaintiff recovered against the judge, the party, and the officer. The whole was a nullity. Sir John Strange says that the officer might have been excused, if they had pleaded separately; but the court in *Perrin v. Procter*, 2 *Wils.* 385, says that he could not, as the whole was a nullity. The vice chancellor had no jurisdiction of the process of warrant without the oath required; and a different oath was the same as no oath at all. Under our statute, the justice has jurisdiction of the process of warrant without oath, as well as summons. In certain cases an oath must be made before a warrant can legally issue; a constable is not to inquire, when he receives a warrant, whether the defendant is a freeholder, and if so, whether an oath has been made, any more than he is to inquire whether the plaintiff is a non-resident, and has given security for the costs. In *Warner v. Shed*, 10 *Johns. R.* 138, it was held that a constable was protected by a mittimus, issued by a court of special sessions, although the conviction upon which it issued was erroneous. In *Curry v. Pringle*, 11 *Johns. R.* 444, a warrant had been issued without oath, against a person having a family, and the action was brought against the plaintiff in the suit before the justice. Mr. Justice Yates, who delivered the opinion of the court, says: "From the facts in the case, it is evident that those proceedings were had on the suggestion, and at the instance of the defendant in whose favor the process issued, which must be deemed to have been done at his peril." He adds: "It might perhaps have been

otherwise, if the justice, as the agent of the defendant, had voluntarily and officiously issued the warrant, without any direct authority for that purpose." It had been decided in *Percival v. Jones*, that where the justice had acted officiously, and had transcended his jurisdiction, he was liable; and in *Taylor v. Trask*, 7 Cowen, 250 it was held that in such a case the justice alone was liable, and not the plaintiff before him, unless it appeared to be his act; and whether his act or not, should not depend on the general intendment of the law, but a positive request or direction should be shown.

The case of *Bissell v. Gold*, 1 Wend., 210, was, like this, an action of false imprisonment, founded on an arrest upon a warrant against a freeholder, issued without oath. That, however, was against the party alone, and not the magistrate. In delivering the opinion of the court, I stated that "without the oath the justice has no jurisdiction over the person of the defendant; and all parties concerned in an arrest under such process, are trespassers." So broad a proposition was not called for; as far as it was applicable to the suit then to be decided, it was undoubtedly correct; but as respects ministerial officers, it must be subject to qualification. I am inclined to think the true rule is laid down in *Percival v. Jones*, that ministerial officers are not responsible for executing any process, regular on its face, so long as the court from which it issues has general jurisdiction to award such process. In that case the court considered a justice, when making out process by direction of the party, as acting ministerially, or as clerk of the party; and that it was very essential that the justice, when acting in good faith, should be protected; "for," the court say, "it would be intolerable to impose on him the necessity of knowing, officially, the property or circumstances of every person in the community;" and they therefore conclude that process must be issued at the peril of the party demanding it. In that case, however, the justice was held liable, because he acted officiously, and not under the direction of the party. Here the justice acted under the direction of the party, and had no means of knowing that he was acting incorrectly; he ought, therefore, according to that case, to be excused.

In issuing process at the request of the party, a justice acts ministerially, and is justified in issuing any process within his jurisdiction which is demanded by a party, provided the justice acts in

good faith. Should he knowingly issue a warrant against the provisions of the statute, he would be amenable in an action. In this case the justice acted *bona fide*, for aught appearing in the case.

Judgment for plaintiff, against Mulliner, and in favor of the defendant Moores.

SUPREME COURT.

PIERCE AND MOORE v. KINGSMILL AND BUSH.

(25 Barb., 631. Decided 1856.)

This action was brought upon a bond by the defendants — Kingsmill as principal and Bush as surety. Kingsmill claimed to be the owner of personal property, taken by virtue of an attachment issued by a justice of the peace, while in the possession of one Jones, and in pursuance of the statute gave the bond claiming to be the owner of said property. The bond contained the condition required by the statute, that if a suit was brought upon it within three months and Kingsmill should establish in that action, that he was the owner of the goods at the time of the seizure, or, in case he failed to do so, if he should pay the value of the goods and chattels with interest, then the obligation to be void. The plaintiffs introduced their evidence and then rested. It was then shown by the defendants that the personal property named was in possession of said Jones in Canada, where Kingsmill, who was sheriff, had seized it, by virtue of an execution; that after such seizure and while the goods were in possession of Kingsmill, they were taken without his consent and removed to this state where they were seized by virtue of an attachment issued against Jones, the defendant, Kingsmill following them, and giving the bond upon which this action was brought. The plaintiffs claimed that the defendants had not proved that Kingsmill was the owner of the goods at the time of the seizure by virtue of the attachments. The court refused so to decide, or to direct a verdict for the plain-

tiffs, but directed a verdict for the defendants, and the plaintiffs excepted.

Cook & Fithian, for the plaintiffs.

A. C. Woodruff, for the defendants.

By the Court, MARVIN, J. By the statute, if any person shall claim any goods or chattels attached by a constable, he may execute a bond to the plaintiff with sureties, &c., in a penalty double the value of the property attached, conditioned that if a suit be brought on such bond within three months from the date, such claimant will establish that he was the owner of the goods seized, at the time of such seizure; and in case of his failure to do so, that he will pay the value of the goods claimed, with interest. (2 R. S. 231, § 33.) The bond was given pursuant to this section of the statute; and the question is, did Kingsmill establish on the trial that he was the *owner* of the goods seized, in contemplation of this statute? In my opinion he did not. By his levy upon the goods he acquired such a special property in them as to enable him to maintain trover for their conversion, or trespass for any wrongful taking. (2 *Saunders*, 47.) After the seizure of the goods by the sheriff, the special property of the goods was in him; the general property remained in Jones, the debtor, who was the general owner until execution executed.

The statute was designed for the general owner of the goods attached; and to satisfy the condition of the bond the claimant must show, upon the trial, that he was the general owner of the goods seized, at the time of the seizure. If the construction of the statute for which the defendants contend is to prevail, consequences would follow which could not have been anticipated by the legislature. A constable or sheriff seizes the goods of a debtor upon execution, in an amount in value greatly exceeding the execution, and then the same goods, as they may be, under certain circumstances, are seized by attachment. Can it be that the sheriff or constable first seizing the goods on execution, can give the bond, and by proving upon the trial such seizure on execution, entirely defeat the attaching creditor? It seems to me that the statute was not designed for such a case. The sheriff by his

levy is not the *owner* of the goods as contemplated by the statute. The language of the statute is used in its popular sense. The sheriff or constable who has levied upon goods, or seized them by virtue of attachments, has never been regarded as the owner of the goods. Webster defines owner, the rightful proprietor; one who has the legal or rightful title, whether he is the possessor or not.

Our law books say that the sheriff who has seized goods on execution has a *special property* in them which will enable him to maintain certain actions against those unlawfully taking or converting the property, but they do not say that he is the owner. On the contrary, they say that the general property, title or ownership remains in the debtor as general owner until the execution is executed; that is, until the property is sold to a purchaser, who then becomes the owner. (*Broom, Action at Law*, 108, 9, 402 to 405, 426 to 432. 2 *Saund.* 47, note. 1 *Chit. Pl.* 151. 12 *John.* 407. 4 *Coven*, 468, 9.)

In *Lambert v. Paulding* (18 *John.*, 311), an execution was issued to the sheriff of New York, which bound the goods of the debtor in the county. The debtor removed a portion of his property to Westchester county, where it was seized on execution by another sheriff, and sold. It was held that the purchaser got a good title. The court, however, on motion ordered that the proceeds of the sale be paid to the plaintiff in the first execution.

It is well settled that in case the sheriff delays to sell the goods seized on execution, by the direction of the plaintiff, for an unreasonable time, another creditor may take the goods on execution or attachment and sell them and apply the funds to his debt. If the sheriff, by the first levy, becomes the *owner*, this consequence would not follow. The title of the absolute owner of the goods is not affected by a sale of the goods upon an execution against a third party.

I am not aware that the question we are considering has ever arisen under the statute; but to hold that a sheriff or constable, who has seized goods on executions or attachments, may give this bond, and by proving such seizure, defeat all subsequent seizures by attachment, would introduce a principle at war with the practice and law touching successive attachments and executions. If such a construction should be put upon the statute, I do not see

why a constable may not take all the goods of the debtor upon an execution for a small amount, and set all subsequent attachments at defiance. In the present case the law afforded abundant remedies to the sheriff from Canada. The law of comity is in full force in this state, and he had all the common law remedies given to our own sheriffs who have seized property on execution; but the statute is not applicable to such a case, though it should be invoked by our sheriffs or constables.

There must be a new trial; costs to abide the event.

SUPREME COURT.

KELLY v. ARCHER AND OTHERS.

(48 Barb., 68. Decided 1866.)

Where an application is made to a justice of the peace for an attachment, the affidavit presented must comply with the statute by specifying the indebtedness of the debtor "over and above all discounts."

Where the ground of the application for an attachment is, that the debtor has departed, &c., with intent to defraud his creditors, to state in the affidavit that he left the county with intent not to return, or secretly and without knowledge of his family, is not sufficient; the affidavit should state that he left with an *intent to defraud his creditors*.

An agreement will not supply the place of a bond which the statute requires shall be executed and delivered to the justice before the attachment issues.

The bond must, in all respects, conform to the requirements of the statute, or the justice acquires no jurisdiction,

Where certain facts are required to be proved to warrant the issuance of process by a court of special or limited jurisdiction, if there be a total defect of evidence as to any essential fact, the process will be declared void in whatever form the question may arise; such process may be attacked collaterally. But where the proof has a legal tendency to make out a proper case, in all its parts, for issuance of process, then, although the proof may be slight and inconclusive, the process will be valid until set aside by a direct proceeding for that purpose—sustaining *Miller v. Brinkerhoff*, 4 Denio, 118.

Where the action was for the unlawful taking and conversion of property, the fact that the defendants were creditors of the plaintiff, does not mitigate the inquiry; the judgment should be for the value of the property taken.

D. McMahon, for the appellant.

S. L. Stebbins, for the respondent.

MILLER, J. The evidence upon the trial of this cause established that the property of the plaintiff was levied upon by the officer by virtue of an attachment issued in favor of the defendants and at their request. Other attachments had previously been issued, judgments obtained, executions levied, and property advertised for sale; but the officer having proceeded to sell sufficient to satisfy the defendants' execution, after the payment of those which had priority, under a levy made by their (the defendants') direction, and they having received the money realized upon the sale, I think the proof was sufficient to make the defendants liable if the sale was illegal and unauthorized.

Whether the sale was lawful or unlawful must depend upon the question whether the proceedings were sufficiently regular to confer jurisdiction upon the justice who issued the attachment. There are several objections to the proceedings, which I think render them void, and are fatal to their validity.

1st. The affidavit upon which they were founded did not specify any indebtedness "over and above all discounts" as required by the statute. (2 R. S. 230, § 28.) This is an essential part of the affidavit, and as it was, there may have been an offset to the demand, and the balance may have been the other way.

2d. The affidavit was also defective in not stating that the defendant had left the county with an intent to defraud his creditors. Although the application was made on that ground, the affidavit is entirely silent as to this material and important fact. (*Miller v. Brinkerhoof*, 4 *Denio*, 118.) It is not enough that he left with the intent not to return, or secretly and without the knowledge of his family.

3d. No bond was executed in conformity with the provisions of the statute. (2 R. S. 230, § 29.) The instrument signed was not executed to the defendant. It was an undertaking to the effect that if the defendants recovered judgment, the plaintiffs would pay all costs which might be awarded, and all damages which the defendants might sustain by reason of the attachment. It not only failed to embrace the language of the statute, but omitted a material and necessary portion of the conditions required by it. This did not comply with the statute, and was not enough. The statute required that a bond should be executed and delivered to the justice before the attachment was issued; and until this was

done, no attachment could issue. No other agreement will supply its place; and as there was no bond, the justice did not acquire jurisdiction, and the plaintiffs were trespassers. (*Homan v. Brinkerhoff*, 1 *Denio*, 184.) The bond will be void if the condition be not such as the statute requires. (*Barnard v. Viele*, 21 *Wend.*, 58.) No other condition than that required by statute will answer; and as it is a jurisdictional and substantial defect, it cannot be obviated.

Some other objections might be urged; but those already stated satisfactorily and conclusively establish that the proceedings were void and of no effect. These defects, so apparent upon the face of the proceedings, are not, I think, of a character to be disregarded. They affect the jurisdiction of the justice; and as they show an entire want of jurisdiction, they cannot be overlooked.

It is insisted by the counsel for the defendants that the proceedings under the attachment cannot be attacked collaterally, by the judgment debtor himself. When certain facts are required to be proved to warrant the issuing of process in a court of special or limited jurisdiction, if there be a total defect of evidence as to any essential fact, the process will be declared void, in whatever form the question may arise. But when the proof has a legal tendency to make out a proper case in all its parts, for issuing the process, then although the proof may be slight and inconclusive, the process will be valid until set aside by a direct proceeding for that purpose. (*Miller v. Brinkerhoff*, 4 *Denio*, 118.) The main difficulty with the affidavit here is that it did not establish the allegation that the defendant in the attachment suit had departed the county with an intent to defraud his creditors. This was an essential part of the case, and was not sustained by any proof whatever. There was a total defect of evidence in this particular; and for this and other defects already stated, the judgment was void.

In *Skinnion v. Kelly* (18 *N. Y. Rep.*, 355), to which we have been referred, the affidavit, upon which the attachment was allowed, proved some positive facts and circumstances which, although far from conclusive, tended to show an intent to defraud. These were not stated on information and belief, as in the case at bar, and the court held, as they no doubt created a conviction in the minds of the creditor and the justice that the debtor intended

to defraud, that they could not say that they were so completely without force, as proof, as to render the proceeding utterly void.

In *Kissock v. Grant* (34 Barb., 144), the affidavit upon which the attachment was issued contained some positive facts which tended to show that the defendant had departed from the county where he last resided, with an intent to defraud his creditors, and which were sufficient to give the justice jurisdiction. Neither of these cases are entirely destitute of the ingredients required to establish a case within the statute.

I think that no error was committed by the referee in allowing the value of the property taken, as the amount of damages which the plaintiff had sustained. The action was for the unlawful taking and conversion of the plaintiff's property, and the fact that the defendants were creditors of the plaintiff did not mitigate the injury. They had no authority to pay their indebtedness by the commission of a wrong; and if nominal damages, only, were recoverable, then every creditor would be justified in paying his debt by taking the law in his own hands. The act of the defendants being unlawful, it cannot be regarded in the nature of a mere involuntary trespass. The present case is not like an action on the case for damages arising from an irregular sale in proceedings for distress for rent where only nominal damages are recoverable. (*Butts v. Edwards*, 2 Denio, 164.) Nor is it similar to a case where the property has been applied according to law to satisfy a debt due from the owner. (*Earl v. Spooner*, 3 Denio, 246.) The defendants here were trespassers from the beginning, in acting under a void process, and the application of the money realized upon the sale was illegal and unauthorized.

These views necessarily lead to the conclusion that no error was committed by the referee on the trial, and therefore the judgment entered upon his report must be affirmed, with costs.

Hogeboom, J. concurred.

Ingalls, J. expressed no opinion.

Judgment affirmed.

SUPREME COURT.

LEWIS v. ELMENDORF.

(2 *John's Cases*, 221. *Decided* 1801.)

A member of congress is privileged from arrest only while *at* congress, or *actually* going to, or returning from congress.

Van Vechten, for the defendant.

Bowman, contra.

Per Curiam. The privilege claimed by the defendant, is founded on the constitution of the United States. There is no statute on the subject. The act of congress, granting a compensation to members during their going or returning, allowing twenty miles travel to a day, does not apply to the question of privilege. This privilege is to be taken strictly, and is to be allowed only while the party is attending congress, or is actually on his journey, going to or returning from the seat of government. The case of *Colvin v. Morgan* (1 *John's. Cas.* 415, and notes), is in point. The motion is denied.

Motion denied. (a)

(a) By the constitution of the United States (art. 1. § 6), senators and representatives in congress are privileged from arrest in all cases, except treason, felony, and breach of the peace, during their attendance at the session of their respective houses, and in going to, and returning from, the same. This privilege ("indispensable for the just exercise of the legislative power in every nation") has always been enjoyed by both houses of the British parliament, and by all the legislative bodies which exist, or have existed, in America. (2 *Story's Comm. on the Const.* 325, § 856. 1 *Black. Comm.* 164, 165. *Com. Dig. Parliament, D.* 17. *Jefferson's Manual*, § 3, *Privilege.* *Benyon v. Evelyn*, *Sir O. Bridg. R.* 334. 1 *Kent. Comm.* p. 221. *Bolton v. Martin*, 1 *Dall. R.* 296. *Coffin v. Coffin*, 4 *Mass. R.* 1.)

This privilege is a shield against all process, such as a *subpœna ad respondendum* and *testificandum* or a summons to serve on a jury, the disobedience to which is punishable by attachment of the person. The reason is well stated by Justice Story. (2 *Comm. on Const.* p. 325, § 857.) "When a representative is withdrawn from his seat by a summons, the people whom he represents, lose their voice in debate and vote, as they do in his voluntary absence. When a senator is with-

drawn by summons, his state loses half its voice in debate and vote, as it does in his voluntary absence. The enormous disparity of the evil admits of no comparison. The privilege, indeed, is deemed not merely the privilege of the member, or his constituents, but the privilege of the house also. And every man must at his peril take notice, who are the members of the house returned of record." This privilege has been stated to be co-extensive with that of witnesses, suitors and jurors (*United States v. Cooper*, 4 *Dall.*, 341; *King v. Coil*, 4 *Day*, 133; *Gibbs v. Mitchell*, 2 *Bay*, 406; see also 1 *Graham's Prac.* 3d ed. 511, 512), which embraces a reasonable time, *eundo, morando et redeundo*, instead of being limited by any precise time. (*Harris v. Grantham*, *Coze*, 142. *Blight v. Fisher*, *Peters' C. C.* 41. *Commonwealth v. Ronald*, 4 *Call*, 97. *Richards v. Goodson*, 2 *Virg. Cas.* 381. *Hurst's case*, 4 *Dall.*, 387. 4 *Yeates*, 124, *note*. 1 *Wash. C. C.* 186. *M'Neil's case*, 6 *Mass. R.* 245, 264. *Meekins v. Smith*, 1 *H. Black.* 636. *Walpole v. Alexander*, 3 *Doug.* 45. *Anon. Lofft.* 34. See the *New York cases*, 1 *Grah. Pr.* 3d ed. 515, 516.) The effect of this privilege is, that the arrest of the member is unlawful, and a trespass *ab initio*, for which he may maintain an action, or proceed against the aggressor by way of indictment. He may also be discharged by motion to a court of justice or upon a writ of *habeas corpus* (*Jefferson's Manual*, § 3; 2 *Str.* 990; 2 *Wilson's R.* 151; *Cas. Temp.* 28); and the arrest may also be punished, as a contempt of the house. (1 *Black. Comm.* 164, 165. 166. *Com. Dig. Parliament*, D. 17. *Jefferson's Manual*, § 3.) In respect to time of going and returning, the law is not so strict in point of time, as to require the party to set out immediately on his return; but allows him time to settle his private affairs, and to prepare for his journey. Nor does it nicely scan his road, nor is his protection forfeited, by a little deviation from that which is most direct; for it is supposed that some superior convenience or necessity directed it. (*Jefferson's Manual*, § 3. 2 *Str.* 986, 987.) The privilege from arrest takes place by force of the election, and before the member has taken his seat, or is sworn. (*Jefferson's Manual*, § 3; but see *Com. Dig. Parliament*, D. 17. 2 *Story's Com. on Const.* 327, §§ 860, 861.) Where a member of congress, who had been surrendered by his bail, claimed to be discharged on the ground of privilege, and the counsel for the bail proposed to remain responsible for surrendering him within four days after the session of congress, which the counsel for the plaintiff agreed to, the court declared their approbation of the compromise, as affording a good precedent for future cases of a similar kind. (*Coze v. M'Clenachan*, 3 *Dall.*, 478.)

SUPREME COURT.

JUDD *v.* FULTON, SHERIFF, &c.(10 *Barb.*, 117. *Decided* 1850.)

In computing statute time the first day, or the day on which the time begins to run, is to be excluded.

Where an act is to be done within a given time, e. g. thirty days, the party has all of the thirtieth day in which to perform it. But if it is to be done *after* the expiration of the thirty days, it cannot be performed till on the thirty-first day ; the law not noticing fractions of a day.

Under 2 *R. S.* 252, § 152, a party may be discharged from imprisonment, on making the requisite affidavit, "*after* he shall have remained in prison thirty days." *Held*, where a defendant was committed to prison on the 25th of August, he could not be discharged before the 26th of September.

THIS suit was brought against the defendant to recover for the alleged escape from the jail limits, of one Eli Hubbard, confined on an execution issued by a justice of the peace. Hubbard was committed on the 26th of August, 1847. On the 25th of September he made the affidavit required by the statute (2 *R. S.* 252, § 152), which was afterwards filed in the Greene county clerk's office. By the jurat of this affidavit it appeared that the affidavit was sworn to on the 26th of September, which was on Sunday. But it was shown that this was a mistake in dating the jurat, and that the affidavit was in fact sworn to on the 25th day of September. The referee reported in favor of the defendant, and the plaintiff now moved to set aside the report.

G. W. Cummings, for the plaintiff.

John Adams, for the defendant.

By the Court, PARKER, J. The defendant was authorized to discharge Eli Hubbard from imprisonment on his making the requisite affidavit, after he had remained in prison thirty days. The language of the statute is, "*after* he shall have remained in prison thirty days." (2 *R. S.* 252.) Hubbard was committed to the custody of the defendant on the 26th of August. On the 25th of September he made the affidavit and was discharged. This was the

thirtieth day of his imprisonment, excluding the day of his commitment. The rule is well settled that in computing time, the first day, or the day when the time begins to run, is to be excluded. (2 *Hill*, 355. 3 *Denio* 12. *Rule* 63.) If the defendant had been required to do an act *within* thirty days from the happening of an event which had occurred on the 26th of August, he would have had the whole of the 30th day, that is, of the 25th of September, for that purpose. But if he was prohibited doing an act until *after* the expiration of the thirty days, he could not do it until the next day, that is, the 26th of September.

A familiar illustration may be drawn from our late practice. If a declaration was served on the last day of August, the defendant, being required to plead in twenty days, had all of the 20th of September for that purpose. But as the default could not be entered till after the twenty days, it could not be regularly entered till on the 21st of September.

If Hubbard was imprisoned at noon on the 26th of August, his thirty days would expire at noon on the 25th of September. He may not have been committed till the last minute of the 26th of August, in which case his thirty days would expire at midnight on the 25th of September. But the law takes no notice of those fractions of a day. Entire days only can be computed. (*Cornell v. Moulton*, 3 *Denio*, 12.)

A construction has been given by the courts to similiar language in other statutes. By the act of 1840, a writ of *fi. fa.* might be issued after the expiration of thirty days from the entry of a judgment. In the *Commercial Bank of Oswego v. Ives* (2 *Hill*, 355), it was held that full thirty days must elapse, excluding the day of entering the judgment, before a *fi. fa.* could be issued. And a judgment having been entered on the 27th of October, and a *fi. fa.* issued on the 26th of November, it was set aside for irregularity. Many other cases in support of this construction are refered to in the opinion in that case, and in the reporter's note.

And such is the English rule also. The act 2 *W. & M. sess.* 1, *ch.* 5, authorized a landlord to sell a distress "after such distress and notice as aforesaid and the expiration of the said five days." It was held that the day of making the distress was to be excluded, and after allowing the five following clear days, the sale should not be until the seventh day. (3 *Chit. Pr.* 109. *Pitt v. Skew*, 1

Barn. & Ald., 208.) The same rule of construction governed the case of *Small v. Eldrich* (5 *Wend.*, 137). The revised statutes had provided that a notice of trial should be served at least fourteen days *before* the first day of the court. It was held to mean fourteen full days, exclusive of the day of service; and a notice of trial served on the *ninth*, for the 23d day of the same month, was decided to be insufficient.

I am satisfied the thirty days had not expired when the affidavit was made; and without expressing any opinion on the other questions, I think the report of the referee should be set aside.

SUPREME COURT.

VAN RENSSELAER v. CHADWICK.

THE SAME v. OGDEN.

(7 *How.*, 297. *Decided* 1852.)

S. C. Sears, for the defendant.

C. M. Jenkins, for the plaintiff.

By the Court, PARKER P. J. The evidence before the court shows very satisfactorily that the summons was never served upon the defendant. Yager, who made the affidavit of service, was not a deputy of the sheriff, but a person employed to serve process in behalf of the plaintiff. The affidavit of service must either be a fiction fraudulently got up by the affiant, for the purpose of deceiving the plaintiff and wronging the defendant, or there has been some mistake on the part of the person making the affidavit. It is possible the summons was served upon some other person of the same name with the defendant, or that some person has personated the defendant. Whatever may be the true explanation, if any, it was certainly in the power of Yager, if he acted honestly, to state particularly, in a further affidavit, the time of day when the summons was served, who were present at such service, if any were present, and the place in the town where the service was made.

The entire absence of such explanation, after the motion had been directed to stand over for such purpose, is strong evidence against the good faith of the transaction.

I cannot agree to the proposition that a return of a sheriff or an affidavit of a person acting in his place is conclusive upon the defendant, and can only be questioned in an action for a false return. The plaintiff relies upon the case of *Putnam v. Mann* (3 Wend., 202). It was there held that a plaintiff, who was a constable, might serve a summons in his own favor issued by a justice of the peace; and that his return could not be impeached in an action of trespass for an arrest under an execution issued on a judgment rendered on the return of such summons; but that if the return was false, the remedy was by action against the constable for a false return. The question decided in that case, and evidently with some hesitation, was, whether trespass or case was the proper action for redress, and the court held the only remedy to be case for the false return. It was there a question between two remedies by action. No motion could have been made in the original action to set aside the proceedings for want of service, a justice of the peace having no power after judgment to entertain such a motion. But no such objection exists in this case. The court has full power over its own process to protect against an improper use of it. Even in cases of mere irregularity, the statute authorizes the setting aside of the judgment on motion within one year after it is rendered.

In all questions relating to the proceedings in the action, the mode of correction is by motion. The remedy is summary and effective. There is no more objection in this than in any other case of irregularity, to a determination of a question of fact by affidavit. It sometimes happens that contradictory affidavits by the respective attorneys, are presented to the court on motion, as to the time, or place, or fact, of service of some notice or other paper in the progress of a cause. In all such cases the facts are determined by the court on the affidavits produced. It seems to follow as a necessary consequence, that if an affidavit of service, uncontradicted, is sufficient evidence to the court upon which to enter judgment, the same kind of evidence should be received, on the other side, to impeach or invalidate it. Indeed, the fact of service can be determined in no other manner: it would be inconsistent to say it should be pleaded, or set up in answer, for that

practice would compel a waiver of the irregularity by appearance.

To hold the affidavit of service conclusive and drive the defendant to an action, would inflict upon him a grievous, and in many cases remediless, wrong. A judgment obtained without notice, and by a false return, might be so large as to sweep away the whole of a defendant's estate, and the remedy for damage lie only against an irresponsible third person who made the affidavit. With the ample powers of this court over its own process and proceedings, there is surely no reason for such injustice.

I think the order made at special term should be reversed with \$10 costs, and the motion granted with costs.

SUPREME COURT.

ROGERS v. BREWSTER.

(5 *John.*, 125. *Decided* 1809.)

* * * * *
* * .

An action on the case lies against a sheriff, constable, or other officer, for maliciously executing process, in an oppressive and unreasonable manner, with intent to vex, harass and oppress the party.

Where a constable having a warrant against A. for a military fine, refused to take property tendered by A., but took and sold his horse with the avowed intent of hurting the feelings of A., and otherwise vexing him, he was held liable to an action on the case, at the suit of A.

ON *certiorari* from a justice's court.

The plaintiff brought an action on the case, against the defendant for maliciously distraining a valuable horse out of his team, for a militia fine, and refusing to take other property, by reason whereof, a great sacrifice of the plaintiff's property was made. The defendant justified under a warrant from the president of a court-martial, and called for a jury. Upon the trial, it was proved that the defendant required of the president of the court-martial, the warrant against the plaintiff, and said he would collect it in such a manner, that the plaintiff would remember it, and that he would take the property nearest to his heart; and that when he called on the plaintiff, he

set his eye on the horse, as he thought the taking of it would most touch the plaintiff's feelings; that when he took the horse, the plaintiff showed to him six or seven large swine and requested the defendant to take them and leave the horse; but the defendant replied, that he would take that which would most touch the feelings of the plaintiff. The justice gave his opinion, at the trial, that if an officer wilfully and maliciously took an unreasonable distress, an action would lie. It appeared that the defendant was a constable, and had the warrant for the collection of the fine. He had previously called twice on the plaintiff for the fine. After taking the horse, he offered to redeliver him on receiving the fine. On the next day, the horse was returned to the plaintiff, on his engaging to produce him at the day of the sale, which was done. The justice decided, that the act concerning distresses (11 *sess. ch.* 36, § 3. 1 *Rev. L.* 435, § 3. 2 *Rev. Stat.* 502), applied; and that it was unlawful for the defendant to levy on a horse, or beast of the plough, while other property could be found. The jury found a verdict for the plaintiff, for five dollars damages, on which judgment was entered by the justice. On these facts, as stated in the return of the *certiorari*, the case was submitted to the court without argument.

Per Curiam.

* * * * * *

* * The constable appears to have executed the warrant in an unreasonable and oppressive manner, and with the avowed and malicious design to vex and oppress the plaintiff, below. When the oppression and malice are thus charged in the *gist* of the action, and are clearly made out, an action on the case will lie. The oppression of officers in the execution of process, is indictable (*L. Raym.* 216. *Cro. Jac.* 426), and a great abuse of the powers of a sheriff, on execution, has been held sufficient to make him a trespasser (*Noy*, 59. 9 *East*, 303, 4), or to bring him into contempt. (2 *Thow.* 87.) If he be charged with a malicious and oppressive proceeding, the proper remedy for this abuse of power is a special action on the case, in which the malice and oppression must both be made manifest. In *Sutton v. Johnstone* (1 *Term Rep.* 503), Baron Eyre, in giving the opinion of the Court of Exchequer, laid down this general principle: that when it could be shown that one man had causelessly and maliciously exercised over

another, to his damage, powers incident to his situation of superior, a special action on the case lay. The judgment in that case was afterwards reversed; but the reversal did not affect the solidity of this principle, in cases not arising under the exercise of military or naval authority. The seizing and selling the horse in the case before us was without any just cause, so long as other property was shown which would have raised the money with equal facility. It was, therefore, a causeless and malicious proceeding. Where a ministerial officer does anything against the duty of his office, and damage thereby accrues to the party, an action lies. The judgment must be affirmed.

Judgment affirmed.

SUPREME COURT.

VOSBURGH v. WELCH.

(11 John, 174. Decided 1814.)

If a justice of the peace issues an attachment under the act (Sess. 31, c. 204, s. 21), against the property of a person, as an absent debtor, without any proof *on oath* before him of absence or concealment of the debtor, he is liable as a trespasser. *Satisfactory proof*, as required by the act, means legal evidence, or such as would be received in the ordinary course of judicial proceedings. A mere return to an execution that the defendant could not be found, is not the satisfactory proof required.

In an action of *trespass quare clausum, &c., et de bonis asportatis*, brought against a justice, for issuing an attachment against the goods of the plaintiff, as an absent or absconding debtor, without legal proof of the fact of concealment, the restoration of the property attached, to the plaintiff, before suit, cannot be pleaded in bar of the action, nor *puis darrein continuance*, but it may be admitted as evidence in mitigation of damages.

THIS was an action of trespass, tried before Mr. Justice Van Ness, at the Columbia circuit, in 1812. The declaration contained several counts, for *trespass quare clausum fregit, et de bonis asportatis*.

At the trial, the plaintiff's counsel, pursuant to previous notice for that purpose, called on the defendant to produce two writs of attachment, issued by the defendant, as justice of the peace,

against the plaintiff, or that he would offer copies of them in evidence. The originals not being produced, the copies were offered by the plaintiff. The first was dated the 25th of October, 1811, under the hand and seal of the defendant, reciting that "whereas satisfactory proof entitling the plaintiff to a writ of attachment, according to the law in such cases made and provided," &c., requiring the officer to attach the goods, &c. of the plaintiff, &c., returnable the 3d of November, 1811. The other writ was the same, excepting that it was dated the 28th of October, 1811, and was made returnable the 7th of November. The officer to whom the attachment was delivered, testified that he served the first writ of attachment on the plaintiff's goods, &c., on the 25th of October, 1811, the plaintiff being at home at the time; and after the property was removed, he discovered that this attachment, with several other writs he had to execute, were made returnable on Sunday, and the defendant sent word to the witness to alter the process in his hands; that the witness altered the attachment so as to make it bear date the 28th of October, and to be returnable on the 7th of November, 1811; and a copy of it was delivered to the plaintiff, who was at home.

It was proved, that, on the return of the first attachment, the plaintiff went to the defendant, who said the cause could not be tried, as the writ had been made returnable on Sunday. On being asked by the plaintiff if the attachment was issued on the oath of any person, the defendant answered that it had been issued without oath. On the return of the second writ, the plaintiff again attended before the defendant, who was proceeding to try the cause, when the attachment was withdrawn. The defendant admitted that no oath was made by any person, of the plaintiff being absent, &c., but said he had sufficient evidence, which he did not, however, disclose.

The defendant gave in evidence an execution, issued by him on a judgment in his court, against the plaintiff, on which was endorsed a return of the constable, dated the 25th of October, 1811, that neither the body nor the property of the plaintiff was to be found. The officer, who was a witness, stated, that being in ill health, and unable to attend to business, he made a return of all the process in his hands, and resigned his office; and that he made no effort to take the plaintiff on the execution. The defend-

ant offered to prove that after the commencement of the suit, part of the property had been returned to the plaintiff, on a settlement made between him and the creditor, at whose instance it had issued. This evidence was objected to, and the point reserved. A verdict was then taken for the plaintiff for 31 dollars and 50 cents, subject to the opinion of the court on the above case. It was agreed, that if the court should be of opinion that the defendant was justified in issuing the attachment, then the verdict should be entered for the defendant; or, if the plaintiff was entitled to recover, and the testimony offered as to the return of the property ought to have been admitted, that the amount of the verdict should be reduced to six cents.

The cause was submitted to the court without argument.

THOMPSON, Ch. J. delivered the opinion of the court. The statute (*sess.* 31, *c.* 204, *s.* 23) requires the justice, before issuing the attachment, to have satisfactory proof offered him of the departure or concealment of the debtor, with intent to defraud his creditors, or to avoid being personally served with process. A mere error in judgment as to the legality of the proof offered, would not make the magistrate a trespasser by issuing the attachment. But such proof, in order to give jurisdiction to the justice, ought, at least, to be colorable. He cannot act upon his own knowledge, or mere belief on the subject, however well founded it may be. Proof, in the sense in which it is used in the act, means legal evidence (9 *John's. Rep.*, 75), or such species of evidence as would be received in the ordinary course of judicial proceedings. The evidence upon which the justice acted, in this case, was not of that description. It did not amount even to the information of the constable that the debtor had departed the county, or was concealed, with intent to defraud his creditors, or to avoid being served with process. The justice might have believed the fact upon mere report, or the information of some person in whom he had confidence. But this would not have been satisfactory proof, within the meaning of the act; nor was the return of the constable, on an execution against the debtor, any such proof. It was altogether foreign and irrelevant. The justice must be considered as having issued the attachment without any proof whatever of the departure or concealment required by the act; and of course, without any authority.

The evidence offered to show that the property taken under the attachment which had been restored to the plaintiff, after this suit was brought, ought to have been received in mitigation of damages. The plaintiff, by his action, seeks to recover not only damages for the taking, but also the *value* of the property. It would be unjust to allow him the value, after the property had been restored to him. It is immaterial as to the person from whom he received the property; having received it, he is not entitled to a compensation for it. If the restoration of the property had been made before the commencement of the suit, it could not have been pleaded in bar of the suit, which is as well for the taking and detention, as the value of the goods; nor, for the same reason, could it have been pleaded *puis darrein continuance*. It follows, then, of course, that the evidence must be received in *mitigation of damages*; otherwise, the plaintiff will recover for an injury which he never has sustained. (6 *Bac. Abr.* 628.) The plaintiff must, therefore, take judgment for six cents only, according to the stipulation in the case.

Judgment for the plaintiff for six cents.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK, THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY AND OTHERS v. SIMON SCHOONMAKER, SIMON P. KEATOR AND SILAS SNYDER.

(63 *Barb.*, 44. *Decided* 1871.)

M. B. Champlain (attorney general), for the people.

T. R. Westbrook, for the other plaintiffs.

Schoonmaker & Hardenburgh, for the defendants.

By the Court, P. POTTER, J. * * * * *

* * * * * * * * * *

This presents the simple question of construction, to wit: Was the

Delaware and Hudson Canal Company, in the contemplation of this statute, a resident of the town of Rosendale? If they were such residents, then the defendants, as commissioners, had no authority to issue the bonds referred to. If the Delaware and Hudson Canal Company were not, in the spirit and intent of this act, *residents* of said town, then the defendants seem to have been authorized to issue such bonds. This question of *residence*, then, is the real if not the only point in the case. Had the proceeding been under the act of 1866, the Delaware and Hudson Canal Company would be, clearly, included; and the valuation of their property would have been also included, because they were tax-payers, and their property was a part of the taxable property of said town. There can be no question as to this. They were not required by that act to be *residents*.

But that act was not satisfactory, and was changed. How, then, does the act of 1868 change the law, and what was the legislative intent in changing it? It is to be presumed that they had some object in view; and it is absurd to assume that they made this change of phraseology in the act, without intending some change in its effect. Certain deductions are clear from the language itself. The former act included all tax-payers; the later does not. That was one change. So that, by the latter act *certain* tax-payers were refused a voice, or a vote, upon the question of consent. Who were intended to be so excluded, or, in other words, who only, by the latter act, could vote or give consent to the issuing of such bonds? The answer is first to be taken from the words of the act itself, viz., *the residents of the town*. Was it the meaning and intent of the legislature, or is it the spirit of the act, that the Delaware and Hudson Canal Company, a corporation whose principal office and place of business is in the city of New York, should be included in the language of this act—*the residents of the town of Rosendale*? Looking at the two acts, alone, I should think this corporation was not intended to be included in the latter act; and looking at the extrinsic circumstances existing at the time; at the meeting of the resident tax-payers of the town, in the fall of 1869; at their resolution to apply to the legislature for such a change of the law as would exclude this and other corporations from voting, or giving or refusing their consent to the issuing of such bonds; followed by the action of the legislature

thereon, in the enactment of the latter act; the construction which would seem to be natural, from the language of the act alone, is confirmed by these circumstances. The gross and apparent injustice of creating a liability against this corporation and their property, without their consent, is a matter chargeable to the legislature, and not to the courts. It is quite probable that the project is not only against their consent, but against, and perhaps in depreciation of, their property that may be burthened to benefit others. But while we may see its injustice, it is our duty only to give construction to the law, not to make it.

It has been ably and elaborately argued that by analogy, and by reasonable construction, this corporation may be held to be residents of the town of Rosendale; and a very large number of cases are cited to show that the courts, in certain cases, have held corporations to be persons, inhabitants and residents. But this is by construction, and for specified purposes; such as to create an equality of liability to taxation, and to confer power to bring or institute actions, the same as citizens; but, for general purposes, and for other special purposes, they are held not to be residents. The taxing acts do not declare them to be residents, but in certain cases make them liable as residents, and while the word *resides* is of frequent occurrence, in the statute, when referring to individuals, it is not so used as applied to corporations. So, "taxable inhabitants" is the language applied to individuals, and not corporations; and corporations are to be assessed by special provisions, and their names to be entered specially in the roll as directed by statute. And, independent of the cases cited, making them "inhabitants" and "residents," by construction, for certain purposes, the natural and ordinary, and literal construction of *residents of a town* would not include corporations; especially those whose places of business were elsewhere. (*See Webster's Dictionary.*) Besides, it may well be doubted whether an act limiting the description of persons who should be permitted to vote, or give consent to the issuing of bonds, and restricting those persons to residents of the town, would include corporations who cannot vote. The word "resident," occurring in the constitution, or in a statute, ordinarily means an individual—a citizen—and does not mean a corporation. In *Bank of the United States v. Deveaux* (5 Cranch, 90), it was held by Chief Justice Marshall, that a corporation—a mere incor-

porated legal entity—is an invisible, intangible thing, yet, being composed of persons, for the purpose of bringing actions is to be considered a person, and also for the purpose of jurisdiction. (*Stevens v. The Phoenix Ins. Co.*, 4 *N. Y.*, 154. *Merrick v. Van Santvoord*, 34 *id.* 218.) To the same effect is *Bundle v. Delaware & Rar. Canal Co.* (14 *How. U. S. R.*, 80); *Conroe v. Nat. Protec. Ins. Co.* (10 *How. Pr.*, 404). And see *Crawford v. Wilson* (4 *Barb.*, 522), as to residence, per Paige, J. For the purpose of bringing actions, they are residents in the county where their office is located. (10 *How. Pr.* 403, 404. *The People v. Pierce*, 31 *Barb.*, 138.) So, too, are various cases holding that a person cannot have a residence in two places. (*Houghton v. Ault*, 16 *How. Pr.*, 77, 84. *Chaine v. Wilson*, *Id.* 552. *Kranshaat v. New Haven Steamboat Co.*, 7 *Rob.*, 356.)

* * * * *

Order affirmed.

SUPREME COURT.

WHEELER v. LAMPMAN.

(14 *John.*, 480. *Decided* 1817.)

IN error, on *certiorari* to a justice's court.

The defendant in error brought an action in the court below, against the plaintiff in error, by summons, which was returned by one *De Grote*, who is stated to be a constable, in these words: "Personally, as the law directs, by me, S. De Grote." The defendant below, by his attorney, appeared on the return of the summons for the purpose of objecting to the constable's return, and the objection was made and overruled by the justice, who decided that the return was sufficient. * * *

* * * * *

The cause was tried by the justice, who gave judgment for the defendant in error.

Per Curiam. Two exceptions are taken to the justice's return:

1. That the constable's return to the summons was insufficient; and 2. * * *

As to the first point. The statute requires, "that the constable serving such summons, shall, upon the oath of his office, return thereupon the time and manner he executed the same, &c." The appearance of the plaintiff below, merely for the purpose of making the objection, was not a waiver of the irregularity of the return, and as the statute is peremptory that the time when the summons is served shall be returned thereupon, its injunctions must be obeyed. If the defendant below had waived the irregularity by pleading to the declaration, without objecting to the return, it would have been too late to make the objection now. There is a good reason for holding a constable to a strict compliance with the terms of the statute in this respect. His return is not traversable, and he is liable to an action for a false return, if the summons has not been served six days previous to the return day. The defendant, therefore, has a right to demand that the constable shall specifically state the time when the summons was served.

* * * * *

Judgment reversed.

SUPREME COURT.

WILLIAM SHAW AND WIFE v. MARY H. LAWRENCE AND OTHERS.

Geo. L. Fox, for the plaintiffs.

Geo. Thompson, for the guardian.

BIRDSEYE, Justice. The application to amend the bond of the guardian *ad litem* for the defendants in this action—(an action for partition)—can be granted only upon compliance with the provisions of §§ 33, 34, of 2 R. S. 556. By § 34, leave to amend may be given on the application of all the obligors in the bond. That application should; doubtless, be by a petition specifying the alterations they ask to have made, and expressly consenting thereto, and agreeing to execute and acknowledge the amended bond. For without that, the amendment might be ordered and made, and then, by their refusal to execute and acknowledge the bond as amended,

the alteration would have released them from the old bond, while no other one would be substituted, and thus all security would be gone. I think a new surety may be joined in the bond, with the former one, upon the proper consent being given by the present obligors.

SUPREME COURT.

RUE v. PERRY.

(63 Barb., 40. Decided 1871.)

THIS action was instituted in a justice's court, by a constable, for the recovery of property levied upon by him by virtue of executions from justices' courts, which property was purchased by the defendant in this action, of the execution-defendant. The property was purchased after the levy from the defendant, who was in possession, and was purchased without knowledge of the levy.

J. D. Wendell, for the plaintiff.

A. H. Ayres, for the defendant.

By the Court, P. POTTER, J. The plaintiff recovered the value of the property, before the justice, and the county court of Montgomery County affirmed the judgment. But this court is not informed upon what grounds it was affirmed, by any opinion given by the county judge; and we are therefore to look at the proceedings before the justice, to see what errors if any were committed by him. Four grounds of error are set forth in the notice of appeal, but only one of these demands consideration, to wit: "*Fourth*. The judgment was unsupported by evidence, in that the plaintiff did not show himself rightfully, nor even colorably, a constable, and in that the evidence of the larger judgment, through which the plaintiff claimed to make title, and which was held to be valid, did not show jurisdiction of the person of the defendant therein."

The plaintiff's complaint based his title to the property in question upon his special interest in the property as constable, by virtue of a levy by executions issued upon two justices' judgments, setting forth the judgments and the executions issued thereon, and proving his levy. This was a sufficient interest to maintain an action. The executions upon which the plaintiff levied were good on their face, and would have justified the plaintiff in his action, had he been defendant and sued in trespass for taking it; even though the justices who issued them had no jurisdiction of the actions in which they were rendered. This is intended to be a rule of protection, but that is not the position of the plaintiff in this action. He is plaintiff, and attempts to build up a title upon judgments, by maintaining an action upon them, against a third person. Here the officer becomes the assaulting party. As was said by Bronson, J., in *Horton v. Hendershot* (1 *Hill*, 119), "this rule is intended for a shield, but not a sword." (*Dunlap v. Hunting*, 2 *Denio*, 645. *Earl v. Camp*, 16 *Wend.*, 562.) The plaintiff fully established that he was a constable. Two judgments were shown; one of \$48.21, the other of \$7.50, upon which the executions were issued under which the plaintiff claims title. The smaller one, I think, was good, and full jurisdiction shown in the justice before whom the judgment was obtained. The only question that can be raised is as to the larger one. And as to this, the first question is, did the justice obtain jurisdiction of the defendant therein?

On the trial, the docket of the justice was introduced in evidence. The justice himself was not called. The docket showed that a short summons had been issued against the defendant, dated July 6, 1869, and returnable on the 9th of the same month, duly served. All that appeared, beyond this, on the docket, was "aff't, short summons issued." No affidavit was proved or produced. And the defendant therein named did not appear, on the return day, but the plaintiff proceeded to obtain judgment on an account. The plaintiff, I think, failed in this to show jurisdiction in the justice. A short summons can only be issued against defendants who come within that class of persons who, by the non-imprisonment act of 1831, now adopted as a part of the provisions in relation to justices' courts (3 *R. S.* 462, §§ 212 to 215, 5th ed.), cannot be proceeded against by long summons or warrant. And that a plaintiff brings himself within that provision must be made to

appear to the justice, by affidavit. This short summons, therefore, is an extraordinary process, and can only issue on proper preliminary proof; and as no jurisdiction is obtained, without such proof, a judgment in this inferior court is to be presumed void, until the party upon whom the onus is thrown supplies that proof. The mere memorandum, "aff't, short summons," upon the justice's docket alone, does not furnish the evidence that the justice had jurisdiction; and as there was no appearance on the part of the defendant, there was no waiver of this objection.

The judgment, so far as the proof on the trial presented it, was clearly void. (*Kelly v. Archer*, 48 *Barb.*, 68, 71. *Imbert v. Hallock*, 23 *How. Pr.*, 460, and cases there cited. *Barnes v. Harris*, 4 *N. Y.* 382.)

I am nevertheless of opinion that the judgment before us ought not to be reversed. When this judgment now claimed to be void, was offered in evidence, the defendant's counsel, being present, not only permitted the docket to be read in evidence, without objection, but admitted it to be evidence. The question of the validity of the judgment was not raised, on the trial; the judge's attention was not directed to any want of validity in it; and it was not made a matter of contest. The court had a right to assume, and take for granted, by the conduct of the defendant and his counsel on the trial, that the justice before whom the judgment was obtained had jurisdiction of the case. It is to be presumed, after judgment, that if the objection had been taken at the proper time, the justice who tried the action, or the affidavit to which the docket refers, could have been produced, and the proper evidence been supplied. The justice who tried this action is to be presumed to have tried it upon the implied theory which the silence of the defendant must be regarded as conceding to be true, to wit, that there was no intent to take exceptions to the validity of this judgment. It is bad faith toward the party; it is unprofessional on the part of counsel; it is trifling with the courts, thus to prosecute or defend actions upon the basis of technicalities induced by bad faith; and courts should never give countenance to such practice. But it is sufficient, here, to put the case on the ground that the party is to be presumed after judgment, to have waived any objection that he might have taken on the trial, but omitted to take. (*Austin v.*

Burns, 16 *Barb.*, 643. *Jenks v. Smith*, 1 *N. Y.* 94. *Duntz v. Duntz*, 44 *Barb.*, 460. *Paige v. Fazackerly*, 36 *id.* 395.)

I think, therefore, the judgment should be affirmed.

SUPREME COURT.

WILLIAMS v. SPENCER.

(5 *Johns.*, 351. *Decided* 1810.)

Where A. let a house, except one room which he reserved for himself and occupied separately; and the outer door of the house being open, a constable broke open the door of the inner room occupied by A. in order to arrest him; it was held, that trespass would not lie against the constable.

IN error on *certiorari*. The defendant in error let out part of his house, and reserved an inner room for himself, which he occupied. The plaintiff in error, who is a constable, having a warrant against the defendant in error, the outer door of the house being open, broke open the door of the inner room, and arrested him. An action of trespass was brought against the constable, before the justice, who gave judgment for the plaintiff.

Tomlinson, for the plaintiff in error.

Foot, contra.

Per Curiam. There was no protection, in this case, to the door of the inner room, though occupied separately by the defendant in error. The constable had a right therefore, to break the door. (*Cowp.* 1.) The judgment must be reversed.

SUPREME COURT.

SETH POPE v. HENRY HART.

(23 How., 215. S. C. 35 Barb., 630. Decided 1862.)

A person applying to a justice of the peace for a warrant for a tort, in the county where he resides, against a non-resident of such county, must state in his affidavit the facts and circumstances showing the grounds of his application, so that the justice may judge of the necessity and propriety of issuing the warrant.

The affiant must state in his affidavit that he believes he has a cause of action for a tort or wrong against the defendant and then set out when and how the claim arose, so that the justice may see that it was *ex delicto*.

The action may be adjourned on the application of the plaintiff for good cause shown, but if he so adjourn without the consent of the defendant for more than twelve hours from the time he was taken before the justice, the defendant must be discharged from custody, although the cause thereby is not discontinued.

THIS action was brought before a justice of the peace of Cortland county and was commenced by warrant. The affidavit on which the warrant issued was in the words and figures following, to wit:

"State of New York, Cortland county, ss.—Seth Pope, of Cortland, in said county, being duly sworn, says that he has, as he believes, a good cause of action against Henry Hart, of Summer Hill, in the county of Cayuga, for fraud and deceit in the sale by him of a certain pair of horses to this deponent, in the year 1857.

"This deponent makes application for a warrant therefor against the said Hart; and further says, that the said Hart is a non-resident of the said county of Cortland, and resides at Summer Hill in the county of Cayuga.

"(Signed.)

SETH POPE.

"Sworn before me this 24th day of January, 1861.

"P. B. DAVIS, Justice of the Peace."

The defendant was arrested and taken before the justice of Cortlandville, by virtue of the warrant, on the 24th day of January, 1861, when the plaintiff complained of him for fraud and deceit in the sale of a span of horses by defendant to plaintiff in March,

1857. The plaintiff alleged that the horses were balky, kicking, untrue and vicious, and that one of them was an original (meaning, as is supposed, a ridgling). He claimed that the defendant knew the horses were thus vicious, and that one was an original or ridgling, and that he made such fraudulent statements and representations to the plaintiff concerning them, as induced him to believe they were kind, true and gentle; and fraudulently concealed the fact from plaintiff's knowledge that one of them was only half gelt.

Before the defendant answered the complaint he objected to the affidavit on which the warrant was issued "as insufficient." The justice overruled the objection, and the defendant excepted. The defendant then answered the complaint, and denied each and every allegation in it.

The plaintiff then asked the justice to adjourn the cause, to which the defendant objected; but the justice adjourned it until the 30th of January, 1861. The defendant excepted to the decision of the justice adjourning the cause on plaintiff's motion. When the cause was tried the plaintiff gave evidence that tended to establish his alleged cause of action. The defendant's evidence tended to show that he was not guilty of any fraud or deceit in the sale of the horses to the plaintiff.

* * * *

Duell & Foster, for the plaintiff.

A. P. Smith, for the defendant.

By the Court, Balcom, P. Justice. A warrant is the only process by which a person can commence an action for a tort or wrong before a justice of the peace in the county in which he resides, against a non-resident of such county. (1 *R. S.* 5th ed., 429, § 15; *id.*, 462, § 213; *Benedict's Treatise*, 3d ed., 68 and 69; 1 *Cow. Tr.*, 2d ed., 461 and 462.) And it is provided by statute that "in all cases on application for a warrant, except when the suit shall have been commenced by summons, the person applying shall by affidavit state the facts and circumstances within his knowledge, showing the grounds of his application, whereby the justice may the better judge of the necessity and propriety of issuing such warrant." (3 *R. S.* 5th ed. 429, § 17; 1 *Cow. Tr.*, 2d ed. 463.) The defendant's counsel insists that the plaintiff did not

state sufficient facts and circumstances in his affidavit in this case, to entitle him to a warrant. But I am of the opinion that he did. He stated positively that he was a resident of the county in which the action was brought, and that the defendant was a resident of Cayuga County. The affidavit was certainly sufficient in respect to the residence of the parties. (See *Benedict's Tr.* 3d ed., 69 and 70; 1 *Cow. Tr.*, 2d ed. 463; *Hunter v. Burtis*, 10 *Wend.*, 360; *Loder v. Phelps*, 13 *id.*, 46; *Smith v. Luce*, 14 *id.*, 237, 20 *id.*, 77; *Whitney v. Shufelt*, 1 *Denio*, 529.) He also stated he had, *as he verily believed*, a good cause of action against the defendant, for fraud and deceit in the sale by him of a certain pair of horses to the plaintiff in the year 1857. This clearly showed, if he had a cause of action against the defendant, that it was not on contract, but was *ex delicto* — in other words, for a tort or wrong.

The contract of sale was stated and proved by way of inducement; but the fraud and deceit constituted the gist of his claim. The defendant's counsel seems to think the plaintiff should have sworn positively that he had a cause of action against the defendant for the alleged fraud and deceit, or that he should have stated more facts and circumstances from which it might be inferred he had such a cause of action.

It will be observed that the statute only requires a person applying for a warrant, to state the facts and circumstances "within his knowledge" showing the grounds of his application. Neither of the authorities above cited, nor any other that I am aware of, holds that the person or party who applies for a warrant in an action *ex delicto* must swear positively that the plaintiff has a cause of action against the defendant, or to sufficient facts and circumstances clearly to show the existence of the alleged cause of action. Such affidavit could not be truthfully made by one plaintiff in twenty.

In this case, if the alleged fraud and deceit were proved on the trial, the same were established by isolated facts and circumstances that were stated by different witnesses, and as to which the plaintiff had no personal knowledge. I think all a person need state in his affidavit for a warrant, as to having a cause of action for a tort or wrong, is, that he believes he has a cause of action against the defendant, and then set out when and how he claims it arose, so that it may be seen to be *ex delicto*. If these views are correct, the affidavit authorized the justice to issue the warrant in this case.

The defendant's counsel contends that the justice erred in adjourning the cause on the application of the plaintiff, from the 24th to the 30th day of January. The defendant was entitled to be discharged from the custody of the constable at the expiration of twelve hours from the time he was taken before the justice upon the warrant, because the trial of the cause was not commenced within that period. (2 *R. S.*, 229, § 25; *Arnold v. Stevens*, 10 *Wend.*, 515; *Benedict's Tr.*, 3d ed., 72; 1 *Cow. Tr.*, 2d ed., 507; *id* 532 and 533.) And as the return of the justice shows nothing to the contrary, it will be presumed he was discharged within that period. But the plaintiff, notwithstanding that, was entitled to have the cause adjourned upon showing good reasons therefor. It is stated in Cowen's Treatise that it is also inferable from the language of the 72d section (3 *R. S.*, 437, § 62, 5th ed.), that the plaintiff in a suit commenced by warrant, although he be a resident, may have an adjournment on his own application; but in such case the defendant is to be discharged from custody. (2 *Cow. Tr.*, 2d ed., 840 and 841.) The cause was not discontinued by the adjournment or discharge of the defendant from the custody of the constable. (2 *R. S.*, 239, § 72, 73.)

* * * * * * *

Decision accordingly.

SUPREME COURT.

TERWILLIGER, DEPUTY SHERIFF OF DELAWARE COUNTY, v. WHEELER
AND OTHERS.

(35 *Barb.*, 620. *Decided* 1862.)

THIS action was tried at an adjourned circuit held in Delaware county in March, 1861.

The case, as stated by the plaintiff's counsel in his opening, was as follows: In the spring of 1859, Simon L. Lewis was the owner and in possession of a certain log raft then lying in the town of Hancock, in the county of Delaware; that on or about the 17th day of February, 1859, John J. Bonner duly recovered a judgment

in a justice's court in said county for \$25, damages and costs; that on the 23d day of February aforesaid a transcript of said judgment was duly filed in the office of the clerk of said county, and judgment duly docketed thereon in said clerk's office and an execution was duly issued thereon by said clerk on the day last aforesaid, and delivered to the plaintiff for collection, who then was, and still is, a deputy of the sheriff of said county; that on the 26th day of March, 1859, the plaintiff, as such deputy, duly levied upon and seized at Hancock, in said county, the raft in controversy, in the action, while the same belonged to and remained in possession of said Simon L. Lewis, the defendant in the execution, and took actual possession of said raft by virtue of the execution and levy, and put one Henry W. Hunt, as his agent, in possession thereof, who run the same for the plaintiff, to the forks of the Delaware river in said town of Hancock, and there landed the same for the plaintiff, who retained the possession thereof until said raft was wrongfully taken from the plaintiff by the defendants; that at the time the plaintiff levied upon the raft, the defendants, Frederick M. and Dewitt C. Wheeler held an alleged chattel mortgage upon the raft, executed by Simon L. Lewis to them; that the plaintiff afterwards tendered to those defendants the amount due upon said mortgage for their claim upon the raft, which tender was accepted by them; that the defendants, a few days afterwards, wrongfully, and without knowledge or consent of the plaintiff, took the raft from the possession of the said deputy sheriff, plaintiff, and run the same to market, and sold the same and appropriated the proceeds thereof to their own use.

The defendant's counsel then asked the court to nonsuit the plaintiff, upon the ground that the action could not be maintained by the deputy sheriff in his own name, but that the action should have been brought by Baldwin Griffin, as sheriff of Delaware county, and that the action could only be brought in his name.

The court granted the motion, and nonsuited the plaintiff, on the sole ground that the deputy sheriff could not maintain the action. To which ruling and decision the plaintiff's counsel excepted.

Judgment was suspended, and the plaintiff's counsel moved for a new trial on the exception taken to the decision nonsuiting the plaintiff.

William Wakeman and William Gleason, for the plaintiff.

Robert Parker, for the defendants.

By the Court, BALCOM, P. J. A deputy sheriff is the agent or servant of the sheriff. (*Colvin v. Holbrook*, 2 Comst., 126.) The levy by the plaintiff as deputy, upon the raft in question, was the act of the sheriff. (*Sheldon v. Payne*, 3 Seld., 453.) He could not have made a valid levy in his own name. All levies and returns by a deputy sheriff must be made in the name of his principal, the sheriff. (*Simonds v. Catlin*, 2 Caines' R., 61. *Coleman & Caines' Cas.*, 354. 23 Wend., 435, 441. 4 Hill, 351. *Crock., on Sheriffs*, §§ 39, 440, 531.) The possession of the raft by the plaintiff, as deputy sheriff, was, in judgment of law, the actual possession of the sheriff; the rule being that the possession of an agent or servant is the actual possession of the principal or owner. (16 Wend., 350 and 351.) Hence, the plaintiff could not maintain the action on the ground that the raft was taken from his actual possession by the defendants. I am aware that a person who receipts goods levied upon, to the sheriff, may maintain actions therefor against strangers who wrongfully take them from him, although he has sometimes been called the servant or agent of the sheriff. But he holds the goods in his own name, and does no act concerning them in the name of the sheriff. He holds them as bailee of the sheriff, and has such a possession and interest in them as entitles him to sue for them when wrongfully dispossessed. (*Edw. on Bail.* 61. 16 Wend., 335.) The plaintiff's counsel seems to think that because a deputy sheriff must be appointed by a writing under seal, and must take an official oath (1 R. S. 877, § 169, 5th ed.), and may be required to give security to the sheriff for the faithful discharge of the duties of his office (10 Paige, 231, 232), he is such an officer, and has such an interest in the goods levied upon by him that he can maintain actions in his own name against strangers who wrongfully take them from him. The difficulty in maintaining this position lies in the fact that a deputy sheriff can do no act in his own name, and never professes to do any for himself. He is only a mere arm or hand of the sheriff, although he takes an oath and gives security for the faithful execution of the trust reposed in him. If a servant or agent takes an oath or gives security that

he will honestly and faithfully do the business confided to him by his employer, he has no greater rights in, or to, any property he has charge of, than he would have without taking any oath or giving such security.

A sheriff or under sheriff may appoint deputies by parol, without writing, to do particular acts only, and such deputies need not take an official oath. (1 *R. S.* 877, § 169, 5th ed.) But I will not pursue these questions further.

The opening of the plaintiff's counsel showed that the defendants had taken but one raft, and that the plaintiff never had any possession or control of that, except as a deputy of the sheriff of Delaware county. And as such possession and control were the actual possession and control of the sheriff himself, it follows that the plaintiff was properly nonsuited, and his motion for a new trial should be denied with costs.

Decision accordingly.

SUPREME COURT.

MILTON W. SKIFF, appellant, v. AZARIAH B. STEWART, NATHAN P. EATON, and MATTHEW F. SHERMAN, respondents.

(39 *How.*, 385. *Decided* 1866.)

APPEAL from order of special term, setting aside attachment.

E. E. Harding, for appellant.

F. C. Peck, for respondents.

DANIELS, J. The application for the attachment was made upon the ground that the defendants were about to assign or dispose of their property, with intent to defraud their creditors. And the questions arising upon the affidavit of the plaintiff, which was presented in support of that application, are those of fact rather than of law. The debt upon which the application was founded was stated to be for money paid out and advanced by the plaintiff,

within the preceding five years, amounting to the sum of twenty thousand dollars, for the use and benefit of the defendants. There is nothing, whatever, in the affidavit showing, or in any manner tending to show, that the moneys were paid out, either wholly or partially, at the request of the defendants, or either of them. Neither does it appear that they have at any time, in any manner, recognized or acknowledged their liability, or promised payment of the debt or any part of it.

The Code allows an attachment to be issued in a case of this description, only when it shall appear by affidavit that a cause of action exists against the defendant or defendants in the action (*Code*, § 229), which in this case the plaintiff has failed to comply with. For even, though it be conceded that he did as he states, at different times pay out and advance these moneys for the use and benefit of the defendants, that would not be sufficient to constitute a right of action against them, without the further fact that it was done at the defendants' request. The statement that the amount mentioned was due and unpaid to the plaintiff from the defendants, does not help the case. For that is the conclusion of the plaintiff, only, from the facts previously set forth, and not the statement of any additional facts or circumstances. If all the facts set forth in the affidavit are true, they would not be sufficient to warrant a recovery of the money claimed against the defendants. It can only appear from the affidavit that a cause of action exists, when the facts and circumstances out of which it arose, are so far set forth as legally to warrant and sustain that conclusion. And that it is the theory of the section of the Code referred to already, because it requires that the affidavit shall not only specify the amount of the claim, but also, the grounds thereof. It is only when that is done that the officer applied to, is authorized to issue the attachment.

The statement contained in the affidavit, which it is claimed supports the plaintiff's conclusion that the defendants were about to assign or dispose of their property with the intent to defraud their creditors, is like the preceding portion of it, exceedingly loose and unsatisfactory. It is that one of the defendants informed the plaintiff, "that he intended to leave this state and go to the state of Georgia, that he should dispose of the property of the said partnership if he could find any one to take it. And any

creditor who did not know enough to take care of himself, must get what he could." Neither the time, nor place, nor the individual who made this statement, is mentioned in the affidavit. The only allusion contained in it on that subject is that it was "lately." This statement indicated a disposition on the part of the person making it to defraud. It substantially placed the creditors at defiance, and referred them to their legal proceedings as the only possible means of securing the payment of their debts. But in order to authenticate it, as the grounds of an attachment, it should have been stated with more particularity. The name of the defendant making the statement, and the time and place where it was made, should have been stated. For in no other manner, can the defendants be furnished with any satisfactory or reliable means of meeting or controverting it. The seizure of the debtor's property before the creditor has secured the establishment of his rights by a judgment, is a harsh proceeding. And to warrant it a plain case should be made out, particularly as the *ex parte* affidavit of the plaintiff, is sufficient to support it. And if the affidavit fails to do that, the attachment should be denied. There seems to be a growing disposition to make applications for attachments, as well as for other provisional remedies, upon very imperfect proofs. There is no justification for this in the very liberal system of practice adopted by the Code, and it is the duty of courts of justice to resist it, if the provisions of the law are to be respected and maintained. The order of the special term should be affirmed.

MARVIN and DAVIS, concurred.

GROVER, dissents.

SUPREME COURT.

STONE v. MILLER AND OTHERS.

(62 Barb., 430. Decided 1862.)

J. M. Muscott, for the plaintiff.

C. D. Adams, for the defendants.

By the Court, Mullin, J. The plaintiff proved on the trial, that he was a constable of the county of Lewis, in November and December, 1860. In November of that year one Riggs applied to a justice of the peace of said county for an attachment, under section 34 of the act to abolish imprisonment for debt, against one Garret Van Koughnet, on a demand arising upon contract. The ground of the application was that Van Koughnet was a non-resident of the county of Lewis. A bond was given as required by the act; an attachment was issued and delivered to the plaintiff, who subsequently made return thereto, as follows: "By virtue of the within attachment I did, on the 22d of November, 1860, attach and take into my custody the goods and chattels mentioned in an inventory of which the annexed is a copy, and immediately, on the same day, I made an inventory of the property seized, and because the defendant could not be found in the county of Lewis, I left a copy of the within attachment and of the said inventory, duly certified by me, at the last place of residence of the said defendant. Said copy of attachment was not personally served on said defendant."

The service was made on the 22d of November. On the 26th, the defendant not appearing, the justice issued a summons against Van Koughnet, returnable on the 28th. This summons was returned that the defendant could not be found, after diligent search. On said last mentioned day, the defendant not appearing, the plaintiff Riggs proved his demand, and a judgment was rendered against Van Koughnet, and subsequently an execution was issued thereon, which was delivered to the plaintiff and by him levied on the property seized on the attachment. Such levy was

made on the 28th of November. On the 6th of December, the defendant in this suit procured an attachment from the county judge of Lewis county, in an action then pending in the Supreme Court, against the property of said Van Koughnet, which was levied on the same day by the special deputy of the sheriff, on the same property seized by the plaintiff in this suit, and the defendants caused the said property to be removed from the custody of the plaintiff to a place designated by them. The plaintiff afterwards demanded the property by virtue of the execution, which being refused, this action was brought.

On the trial the plaintiff was nonsuited, on the ground that he did not, on his return to the attachment, state that he left a copy of the attachment and inventory with the person in whose possession the property attached was found. The plaintiff offered to prove that the property was not found in the possession of any person, which evidence was rejected.

The only question arising on this appeal is whether the justice issuing the execution, by virtue of which the plaintiff claimed the property, did not lose jurisdiction by reason of the omission of the officer to make the return above mentioned. It can not be doubted but that the justice acquired jurisdiction to *issue* the attachment in favor of Riggs; nor but that the plaintiff, by virtue of the levy thereon acquired, if his return was not defective, such a special property in the goods as would enable him to recover their value against any person illegally appropriating them. (*Van Loan v. Kline*, 10 *John.*, 129. 12 *Wend.*, 153.) But the attachment and levy, by virtue thereof, cease to bind the goods, and of course the title of the officer levying determines when a judgment is recovered and a levy made on the same goods by virtue of an execution issued thereon. (*Sterling v. Welcome*, 20 *Wend.*, 238.) The object of the attachment is to seize and hold goods until the creditor shall have had opportunity to try the question of indebtedness with his debtor, and to obtain an execution upon the judgment, if one is rendered in his favor. After the levy on the execution, the officer holds the goods by virtue of it and not by virtue of the attachment, except so far as the priority of levy on the attachment enures in favor of the execution. The validity of the attachment, and of the levy thereon, does not entitle the plaintiff to recover in this case, because when the

defendants caused the property to be seized, the plaintiff held by virtue of the levy on the execution. The defendants were not mere strangers; they were creditors of Van Koughnet and rest their right to the property on attachments issued in an action in this court, and their title is not impaired by reason of defects, if any, in the proceedings to procure the attachment. The court having jurisdiction of the subject matter, defects, if any exist, are amendable, and do not render void the proceedings.

Let us now proceed to inquire, 1st. Whether the return of the plaintiff to the attachment was defective; and 2d. Whether such defect deprived the justice of jurisdiction, and thereby rendered void the execution and levy thereon. The attachment on which the plaintiff relies was issued under the 32d section of the non-imprisonment act, and on the ground that the plaintiff was a non-resident of the county. By section 36 of the same act it is provided that the attachment issued by virtue of said act shall be served in the manner provided for the service of attachments under *title 4, article 2 of chapter 2, part 3 of the Revised Statutes*. By sections 29, 30, of the title referred to, it is provided that the constable shall execute the same by attaching and taking into his custody such part of the goods of the defendants as shall not be exempt from execution, and as shall be sufficient to satisfy the plaintiff's demand; and make an inventory thereof, and leave a copy of the attachment and of the inventory certified by him, at the last place of residence of the defendant; but if the defendant have no place of residence in the county where the goods, &c., are attached, such copy and inventory shall be left with the person in whose possession the goods, &c., are found. Section 36 of the non-imprisonment act provides that if the defendant can be found in the county, the copy of the attachment and inventory shall be served on him personally, and the return shall state specifically whether such copy was or was not personally served on the defendant. Section 37 of said act declares that if the attachment issued in one of the cases provided for in said act, is personally served, the justice, on the return day, shall proceed to hear and determine the cause in the same manner as upon a summons returned personally served. But if (§ 38) the attachment and inventory are returned not personally served, and the defendant does not appear, the plaintiff may take out a summons against the defendant, and if

such summons be returned that the defendant cannot be found after diligent inquiry, the justice shall proceed to hear the case as upon a summons returned personally served.

The plaintiff established, by his affidavit, to the satisfaction of the justice, that Van Koughnet was a non-resident; he could not, therefore, have a residence in said county. The plaintiff probably did not know upon what ground the attachment was issued, and did not know, officially, that Van Koughnet was a non-resident. But on the facts before us we must assume that when he went into the neighborhood where Van Koughnet had formerly resided, to inquire for him, he ascertained that he was not a resident of the county; at least we must presume that he ascertained that he had not then a residence in the county, and thus the case arose in which the statute required the copy of the attachment and inventory to be left with the person in whose custody the goods were found. This was not done; the service was therefore defective. It is true that the statute permits the officer to serve the attachment by leaving a copy at the last place of residence of the debtor, and he is not bound to leave copies with the person in whose possession the goods are found, except when the defendant has no place of residence in the county, and that it is left with the officer to determine which mode of service he will adopt, and having taken one the argument is, that the facts did not exist which justified the other. But we must have regard to the subject matter of the statutes, in construing them. We are dealing with an attachment issued under the non-imprisonment act. That act authorizes an attachment to issue on proof of non-residence. Non-residence was not ground for issuing an attachment under the Revised Statutes in force when the non-imprisonment act went into operation. Under the Revised Statutes, an attachment might issue against a debtor who had departed or was about to depart the county, or kept himself concealed therein, with intent to defraud his creditors. Such a debtor might well have a residence in the county; at least he could have a last place of residence, at which copies of attachment might be left. But in the case of a man who had openly and publicly removed from one county, into another, in which he became a resident, it would be absurd to say that the legislature intended to permit service to be made upon him by leaving papers at his last place of residence. To permit such a mode of service

against a non-resident, would lead to the grossest abuses. It seems to me, therefore, that in cases of non-residents, the attachments, &c., must be served by leaving them with the person in possession of the goods. But it is asked how the officer is to determine whether the defendant is a non-resident or absconding debtor? I answer, 1st. From the affidavit on which the process issues; 2d. By finding or failing to find the residence of the debtor in his county. If he find none, then he serves by delivering to the person in possession of the goods; if he find a residence, he serves by leaving the copies there. There is no risk incurred by the officer. The rules prescribed for the service are plain and intelligible, and easily complied with. The return of the plaintiff in this case designates the place where he left the copies of the papers, as the last residence of the debtor, showing quite clearly that it was not his residence at the time of the service.

It is further urged, in support of the return, that it is not to be presumed that the property was found in the possession of any person, and if not in some one's possession the officer could not serve the attachment otherwise than by leaving it at the last place of residence. Part of this property attached was found in a barn, and another part in an uninhabited dwelling, if I recollect the evidence correctly. It was shown that the goods were not in the actual possession of any person, that is, no one lived on the premises on which they were found. Title to real estate draws after it the right to the possession, and the one entitled to the possession of the soil is to be deemed in actual possession for all the purposes of protecting the property when the right of action rests on possession. The possession in such a case is said to be a possession in law, as distinguished from possession in fact. (*Jacob's Law Dic. tit. Possession.*) So the owner of personal estate may sue for an injury to it, although it has never been in his possession. The bailee entitled to the possession merely may also sue; so may the finder. (1 *Chitty's Pl.* 167, 168.) The owner of the premises on which the property was stored was in possession of it, and entitled, on such possession, to resist a mere wrongdoer. But naked possession, without any interest in, or right over, the property, is all that the statute requires, in order to make it the duty of the constable to serve on the one thus having the possession. There must have been some person who was in the possession

of the goods, and whoever that was, it was the duty of the officer to serve on him: and not having done so, it seems to me that the service of the attachment was not in accordance with the statute.

Let us next inquire what effect, if any, this defect in the service and return had on the lien of the attachment and subsequent proceedings before the justice. The rule applicable to all inferior and limited tribunals is, that their jurisdiction is never presumed, but on the contrary, must be alleged and proved. When the jurisdiction of the court or officer is made to depend on the return of process in a given form, or proof of a particular fact, and the return is not substantially in the form prescribed, or the fact is not proved, the court or officer does not acquire jurisdiction, and the proceedings are utterly void. (*Cleveland v. Rogers*, 6 *Wend.*, 438. *Miller v. Brinkerhoff*, 4 *Denio*, 118. *Willard v. Sperry*, 16 *John.*, 121. *Vosburgh v. Welch*, 11 *Id.* 175. *Davis v. Marshall*, 14 *Barb.*, 96. *Adkins v. Brewer*, 3 *Cowen*, 206. *Bigelow v. Stearns*, 19 *John.*, 39; and cases cited in dissenting opinion of *Bronson, J.*, in *Hoose v. Sherrill*, 16 *Wend.*, 36.)

By the 38th section of the non-imprisonment act, it is provided that if, at the return day of the attachment, it shall appear by the return that property was attached, and that a copy of the attachment, &c., was not personally served, the justice may issue summons, &c., and on the return of the officer enter judgment. It cannot appear that property is attached unless the attachment has been served, and returned as required by the statute. Unless property is shown to the justice to have been attached, he has no right to proceed to issue further process, to enter judgment or to issue execution.

It only remains to inquire whether the defendants were precluded from asserting the illegality of the proceedings in this action brought against them, or in other words, whether they are voidable merely, and only subject to correction on review of the proceedings before the justice, or void and assailable in a collateral action. It would be an endless labor to enter into an examination of the cases with a view to reconcile the conflict between the courts of England and America, and between the decisions of the same court, in both countries. I think it will be found to be a universal rule, that when the defendant in the proceedings in controversy has never been personally served, nor appeared, and there is a defect in

jurisdiction, it is fatal, and can be taken advantage of by any person interested in or affected by them. When the service is personal, it has been held, in one or two cases, that if the defendant does not appear he loses the right to object to the defect of jurisdiction, in a collateral action. (*Hoose v. Sherrill*, 16 Wend., 33. *Bromley v. Smith*, 2 Hill, 517.) And when the party appears and does not object, he waives all objection, and his appearance confers jurisdiction. But in this case there is no personal service to cure defects of jurisdiction. The levying of the attachment was a proceeding *in rem*, and it was complete when the levy and a proper return were made. The subsequent proceedings to obtain a judgment depend, for their validity, on that of the proceedings under the attachment; and a creditor who, subsequent to the attachment, acquires a lien upon, or interest in, the property, has a right to insist that the prior attaching creditor shall show a valid right to appropriate the property. This he can only do by showing his proceedings to be in conformity to the requirements of the statute. This the plaintiff has not done, and he cannot hold the property against a subsequent attaching creditor.

The judgment should therefore be affirmed.

MORGAN, J., dissented. Judgment affirmed.

SUPREME COURT.

FURMAN AND OTHERS v. DAVID WALTER.

R. AND H. DART v. SAME.

(13 How., 348. Decided 1856.)

Montgomery Special Term.

MOTIONS by the defendant to set aside attachments issued in these actions.

A. H. Ayers, for the defendant.

A. Hees, for the plaintiffs.

PAIGE, *Justice*. On these motions three questions arise. 1st. Whether the original affidavits on which the attachments were issued, are sufficient to sustain them? 2d. Whether the plaintiffs can, on these motions, read supplemental affidavits in support of such attachments, or move to amend the original affidavits by supplying the defects therein? And, 3d. * * * *

* * * *

1st. Are the original affidavits sufficient to sustain the attachments? The attachments were issued under §§ 227, 228 and 229 of the Code, and in actions previously commenced and pending in this court. They are distinguishable from the attachments authorized to be issued under the provisions of the Revised Statutes, and the act of 1831, to abolish imprisonment for debt, &c. (2 *R. S.* 230, §§ 26, 28, 1 *ed.*; *Act of 1831*, p. 404, §§ 34, 35; *amended by act of 1842*, ch. 107, p. 74; 2 *R. S.* 2 and 3, 1 *ed.*)

The attachments issued under the Revised Statutes, &c., are special proceedings; are the original process by which suits are commenced; and a strict compliance with all the requirements of the acts under which the proceedings are had, is necessary to confer jurisdiction; and one of these requirements is, that the affidavits must state the facts and circumstances to establish the grounds of the application for the attachment. (7 *Hil.*, 187; 4 *id.* 548; 21 *Wend.*, 672; 7 *Barb.*, 182; 18 *Wend.*, 611; 2 *id.* 298; 21 *id.* 310; 4 *Denio*, 118; 3 *Com.*, 41.)

An attachment under the Code is not original process, and by it a suit is not commenced, nor upon it alone can a judgment be obtained; but it is a provisional remedy adopted in a suit already commenced. (*Code*, §§ 99, 227; *Cole agt. Kerr*, 2 *Sand.*, 661; 12 *Barb.*, 265.)

It is in consequence of this distinction that it has been held, in several cases, that the sufficiency of the affidavits on which the attachment under the Code issues, is not a jurisdictional question. (12 *Barb.*, 265, 273, 282; 3 *Sand.*, 703; 10 *How. Pr. R.*, 6.) The contrary rule prevails in relation to attachments under the Revised Statutes and the act of 1831.

As the jurisdiction of the court or officer, in cases under the Revised Statutes and the act of 1831, depends upon the facts set up in the affidavits, the sufficiency of such affidavits is necessarily a jurisdictional question; and if the affidavits fail to state facts

necessary to confer jurisdiction, the defect cannot be supplied, either by an amendment or supplemental affidavits.

The Code differs materially from the Revised Statutes (*pp.* 230, 232, 233, 1 *ed.*), and the act of 1831 (*p.* 404), in its requirements in relation to the contents of the original affidavits, on which the attachments are issued. The Revised Statutes require that the application for the attachment shall state the grounds upon which it is founded; and that the facts and circumstances to establish such grounds shall be verified by the affidavits of two witnesses; and the act of 1831 requires that the plaintiff shall, by his own affidavit, or that of some other person, prove, to the satisfaction of the justice, the facts and circumstances to entitle him to the attachment. The Code (§ 229), declares the attachment may be issued whenever it shall appear by affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the grounds thereof, and that the defendant is, &c., not a resident of the State, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent.

The Code omits the requirement found in the Revised Statutes and in the act of 1831, that the facts and circumstances to establish the grounds of the application shall be stated in the affidavits on which the attachment is applied for. It is sufficient, under the Code, if it appear by affidavit that a cause of action exists against the defendant, &c., and that he is a non-resident of the State, or has departed therefrom with intent to defraud his creditors, &c. If these specific facts, which are the grounds of the application, are made to appear by affidavit to the officer who issues the warrant of attachment, the attachment is regular, although the facts and circumstances to establish such grounds may not be stated at length in the affidavit; in other words, it would seem, from the peculiar language of the Code, that if the facts of the existence of the cause of action, and that the defendant is either a non-resident of the State, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, &c., can be made to appear by positive allegations in the affidavit, the affidavit will be sufficient, although it omits to specify the particular facts and circumstances which tend to establish the fact of non-residence, or departure from the State with intent to defraud creditors, &c.

In the actions in which the present motions are made, the original affidavits, verified on the 19th of April and 1st of May, 1856, by J. T. Easton, and by one of the plaintiffs in each action, state in positive terms that a cause of action exists against the defendant, &c.; that the defendant declared to the witness Easton, about the 1st of April, 1856, that he was going to Kansas, and that he had not been seen since the night he made such declaration; and this witness further states, that he had no doubt the defendant had gone to Kansas and had left the State; and the plaintiffs state, in their affidavits, that a summons had been issued in the actions, and that the defendant had departed from the State with intent to defraud his creditors, or to avoid the service of process, or kept himself concealed therein with the like intent.

These affidavits may be construed as stating positively on the declaration of the defendant, in connection with the fact that the defendant had not been seen since the declaration, that the defendant had departed from the State; and at least on belief (although the statement is in positive terms), that he had departed from the State with intent to defraud his creditors, or to avoid the service of a summons. The general term of this district decided, in *Fulton v. Heaton* (1 *Barb.*, 552), that a similar affidavit was sufficient to authorize an attachment under the provisions of the Revised Statutes in relation to justices' courts. (2 *R. S.* 230, §§ 34, 35—as amended by the act of 1831, p. 404, §§ 34, 35—which act was amended by act of 1842, p. 74.)

It was held in that case upon the authority of *Johnson v. Moss* (20 *Wend.*, 145), *Smith v. Weed* (*id.* 184), and *Smith v. Luce* (14 *id.* 237), that an affidavit was good, although the applicant swears only to his belief as to the intent to defraud, provided he sets forth, on his positive oath, the facts and circumstances on which such belief is founded. (*See* 2 *Wend.*, 298; 18 *id.* 614.)

In cases arising under the Revised Statutes, if enough is proved to call upon the officer for the exercise of his judgment upon the weight and importance of the evidence; and if he errs in the decision of a question thus fairly presented, the error would not be fatal to the proceedings. It is only when there is a total want of evidence upon some essential point that the officer will fail to acquire jurisdiction. (4 *Hill*, 602; 20 *Wend.*, 77.) It may, perhaps, be objected, in the cases under consideration, as was done in

Frost v. Willard (9 Barb., 445, 446), that an affidavit stating positively, in the words of the Code, that the defendant had departed from the State with intent to defraud his creditors, was insufficient, as the intent of the debtor could not be known to the witness; and hence the necessity may be urged of stating the facts and circumstances which tend to show such intent. (21 Wend., 672.)

There is, undoubtedly, force in this objection. And it may also be objected that the single fact of the defendant's departure from the State, which may be regarded as positively sworn to, is not, standing alone, unaided by any other fact or circumstance, any legal evidence of a departure from the State with intent to defraud creditors. The Code declares that the existence of the facts—all the facts—necessary to authorize the issuing of a warrant of attachment, must appear by affidavit.

If, however, the affidavits in these cases show enough to call upon the officer to exercise his judgment upon the weight of the evidence in establishing the grounds of the application, the affidavits, on a motion to set aside the attachments for irregularity, will be held sufficient.

Nevertheless, as the sufficiency of the original affidavits in these cases may be questioned, I will proceed to discuss the *second question*, viz.: Whether the plaintiffs can, on these motions, read supplemental affidavits in support of the attachments; or move to amend the original affidavits by supplying the defects therein?

The application of the defendant is, to set aside the attachment as irregularly issued, upon the ground of the insufficiency of the affidavits on which they were founded.

Upon the question whether, on such applications, new affidavits can be read in support of the attachments, the decisions have been conflicting.

In *Conklin, &c., v. Dutcher* (5 How. Pr. R. 386—decided in July, 1850), it was held by the general term of the sixth district, that on motions to set aside attachments issued under the Code, neither affidavits on the part of the defendant disproving the facts set forth in the affidavits on which the attachments were granted, nor additional affidavits in their support on the part of the plaintiff, could be read. It was further held in that case, that the warrant of attachment, signed by the judge, or his allowance indorsed thereon, was an order; and that the remedy of the defendant was

by an appeal to the general term, under § 349 of the Code, or by application to the judge to vacate the order; or, in case of irregularity, to a special term to set aside the attachment. This decision was followed by Judge Harris in *Bank of Lansingburgh v. M'Kie*, and in *White v. Featherstonaugh*, decided in December, 1851, and December, 1852. (7 *How. Pr. R.* 357, 360.) An argument was used to sustain these decisions—that if it had been the intention of the legislature that new affidavits might be read by either party on a motion to set aside an attachment, it is to be presumed that such intention would have been expressed, as it was in the case of an order for arrest, and an order of injunction. (*Code*, §§ 204, 205, 225, 226.)

The decisions in these cases are opposed by those in *Morgan v. Avery* (7 *Barb.*, 656), *Genin v. Tompkins* (12 *Barb.*, 265, 282), *Bank of Commerce v. The R. & W. R. R. Co.* (10 *How. Prac. Rep.* 6), *The New York & Erie Bank v. Codd* (11 *How. Pr. R.* 221), and in *St. Arnoux v. De Beixcedon* (3 *Sand.*, 703). In *Morgan v. Avery* (decided in January, 1850), a case at special term before Judge Edmonds, which was a motion to set aside two attachments, it was held that the affidavits on the part of the plaintiffs might be received as well in answer to those on the part of the defendant, as in support of the original application for the attachments. A like decision was made in *Genin v. Tompkins*, by the general term of the first district, in December, 1851. In this case, it was expressly held, that if there was any insufficiency in the original affidavits the defect might be supplied by supplemental affidavits. (12 *Barb.*, 282—*per King, J.*)

The same principle, viz., that new affidavits might be used on both sides, on a motion to set aside an attachment, was advanced by Judge Hand in *Bank of Commerce v. The R. & W. R. R. Co.* (10 *How. P. R.*, 6, June, 1854). In the *New York & Erie Bank, v. Codd* (11 *id.*, 221), the general term of the 8th district, in May, 1855, decided that, on a motion before the judge who issued the attachment, to vacate the same, both parties might read affidavits in support of, and in opposition to, the motion: and that on an appeal to the general term from the order of the judge at chambers, the court will not be confined to the question whether the original affidavits were sufficient, but will review the decision of the officer on the merits.

In *St. Arnoux v. De Beixcedon* (3 Sand., 703), the Superior Court of the city of New York held, expressly, that on a motion to set aside an attachment, the plaintiff might read supplemental affidavits in support of those upon which the attachment was issued.

From this review of the cases, it is apparent that the weight of authority is decidedly in favor of the admissibility of counter-affidavits on the part of the defendant, on a motion to set aside or vacate an attachment; and also of supplemental affidavits on the part of the plaintiff, for the purpose of sustaining the attachment. This proposition, in my judgment, is authorized by the true construction of the Code, and by established principles of law. The attachment under the Code is not original process; by it the action is not commenced; but it is *mesne* process issued during the progress of an action, in which the court has already acquired jurisdiction, both of the subject-matter of the action and of the person of the defendant, by the previous personal service of a summons; or by its delivery to the sheriff with the intent that it shall be actually served. (Code, § 99.)

It is not like the cases of attachments under the Revised Statutes, a special proceeding, or original process, where a strict compliance with all the requirements of law are necessary to confer jurisdiction. Jurisdiction having been already acquired in the action, no jurisdictional question can arise out of the issuing of an attachment under the Code, or the affidavits on which it is founded. Where a court has once acquired jurisdiction, its proceedings can not be rendered void by any subsequent error or irregularity; they may be reversible, but, until reversed, they are valid in respect to everybody. (6 Barb., 624; 8 Cow., 178, 187; 2 C. & H. Notes, 978, 989; 3 Den., 168.)

A Court having once acquired jurisdiction in an action of both the subject matter and person of the defendant, it possesses an inherent power to control and regulate the subsequent proceedings, and all process which may be issued during the progress of the suit.

The attachment under the Code is a remedial process of great value to creditors, and of great importance to debtors, as under it their whole property may be attached and kept as security for the plaintiff's demand at the commencement of the litigation. It is

essential to a fair administration of justice, that a process so important and potential should be under the control of the court; to the end that the just benefits of it should be secured to the creditor, while it should not be allowed to be used as an engine to oppress the debtor. The control over this process can be exercised by the court, according to its practice, by special motion. This power of control of the Supreme Court, being a court of general jurisdiction, is inherent in its character as a court, and does not depend upon any special statutory provision.

By virtue of this power, the court, on a special motion to set aside an attachment issued under the Code, or the judge who issued the attachment, on a motion to vacate the same, can unquestionably receive as well counter affidavits on the part of the defendant, to disprove the facts set forth in the affidavits on which the attachment was founded, as supplemental affidavits on the part of the plaintiff in support of the attachment.

It would seem, also, that the attachment and original affidavits, being proceedings in an action, come within the 173d section of the Code, which authorizes the court, in furtherance of justice, to amend any pleading or proceeding by inserting material allegations therein.

I have, therefore, concluded to receive the additional affidavits presented by the plaintiff, on the hearing of the motions, in support of the attachments in question. These additional affidavits supply the defects in the original affidavits, and satisfactorily show that the defendant did depart from the State with intent to defraud his creditors, or to avoid the service of a summons.

* * * * *

The motions to set aside the attachments must be denied, with \$10 costs, to be paid in each action by the defendant to the respective plaintiffs in such actions.

SUPREME COURT.

IN THE MATTER OF WILLIAM HOLLINGSHEAD, PROCEEDED AGAINST
AS AN ABSCONDING OR CONCEALED DEBTOR.

(6 *Wend.*, 553. *Decided* 1831.)

In an application for an *attachment* against an absconding or concealed debtor, the creditor must state that his *demand arose upon contract, or upon a judgment or decree rendered within this State.*

MOTION to vacate attachment. The attachment was applied for by a firm. In the application it was stated that Hollingshead was *justly indebted to them in the sum of \$500 and upwards, over and above all discounts*; and that he had secretly departed from, or kept himself concealed within, the State, with intent to defraud his creditors, or to avoid the service of civil process. The application was verified by the affidavits of one of the firm, and of two disinterested persons. Upon this application and proof, the recorder of New York issued an attachment, which is now moved to be set aside.

D. Graham, jun., for the motion.

J. L'Amoureux, contra.

By the Court, SUTHERLAND, J. The application for an attachment can be made only by a creditor having a *demand against the debtor, arising upon contract, or upon a judgment or decree rendered within this State, amounting to \$100, or upwards.* (2 *R. S.*, 3, § 3.) The next section of the act prescribes that the application shall be *verified by affidavit*, in which shall be specified the sum in which the debtor is indebted to the creditor over and above all discounts. The last requirement is similar to that contained in the old law (1 *R. S.*, 157, § 1); but the requirement that the nature of the indebtedness shall be shown, is a new provision incorporated into the Revised Statutes. This requirement not having been complied with in this case, the attachment issued irregularly, and must be set aside.

SUPREME COURT.

IN THE MATTER OF THE PETITION OF JOHN BERRY, RECEIVER OF
THE ATLAS INSURANCE COMPANY.

(26 *Barb.*, 55. *Decided* 1857.)

An appeal and security have no retrospective effect. They do not undo anything already done, or take away any lien once created. They only stay an execution if it has not issued, or its *further execution* if it has issued ; so that if issued, and a levy made, the sale under the levy is stayed but the levy is not interfered with.

Whatever rights or liens are acquired are treated as if they were vested rights not to be superseded by personal security, but suspended only until the decision of the appellate court.

C. C. Egan, for the appellant.

Yound & Ruthven, for De Wolf.

By the Court, MITCHELL, P. J. * * * * *

Under the Revised Statutes a writ of error with sureties and an order of stay, if an execution had been issued, but not fully executed, stayed the further execution thereof. (2 R. S., 597, § 30.) If the execution had been levied but no sale had taken place, it stayed the sale. (*Delafeld v. Sandford*, 3 *Hill*, 473.) If an appeal were taken and a bond given, but not in due form, and leave were given to amend the bond, and then execution issued and was levied, the court, on the amendment being completed, would supersede the execution, thus putting the appellant where he was when the amendment was allowed. (*Clark v. Clark*, 7 *Paige*, 607.) If an appeal were taken from a justice of the peace to the common pleas, it released goods levied on, from the lien. But this was by virtue of the express words of a particular statute. (2 R. S. 259, § 192, &c.; *Wilson v. Williams*, 18 *Wend.*, 581.) The code has not the minute provisions of the Revised Statutes as to the effect of a writ of error or appeal, and security given thereon. It provides, in general terms, that "if the appeal be from a judgment directing the payment of money, it

shall not stay the execution of the judgment unless "an undertaking be given, "to pay the money." Before the Revised Statutes, a writ of error did not stay an execution after levy. (*Delafeld v. Sandford, supra.*) It might be a question whether the language of the Code does not restore the law; but a literal construction of it, and the general principle that it ought not to be construed as changing the old law, when it has substituted language that may embrace the old, would sustain the amendment made by the Revised Statutes. Still this general principle pervades all the provisions of the Revised Statutes (and of the Code by consequence) that the appeal and security have no retrospective effect. They do not undo anything already done, or take away any lien once created. They only stay an execution if it has not issued, or its *further execution* if it has issued; so that if issued and a levy was made, the sale under the levy was stayed, but the levy was not interfered with. Whatever rights or liens were acquired were treated as if they were vested rights not to be superseded by personal security, but suspended only until the decision of the appellate court. This lien continued, even as to real estate, and made it necessary that the legislature should interfere, and by a special amendment of the Code (§ 182) enable the *court*, on notice to the respondent, to direct an entry to be made on the docket of the judgment, "secured on appeal." This cannot be done except by leave of the court, and on motion, and is not the necessary effect of the appeal. When the order and entry are made, the lien of the judgment is not discharged as to all persons, and not at all as to subsequent judgment creditors. The judgment then only "during the pendency of the appeal ceases to be a lien on the real property of the judgment debtor as against purchasers and mortgagees in good faith." In other words, purchasers and mortgagees in good faith may then, during the appeal, deal with the real estate as if there were no lien on it; but they cannot after the appeal is disposed of, and as to subsequent judgment creditors the lien remains undisturbed. This shows that in this case the respondents, after the appeal was dismissed, were entitled to resume proceedings on their execution, and have priority over a subsequent execution. More delay would not take away this lien. (*See matter of Clark, 3 Denio, 167.*)

* * * * *

SUPREME COURT.

IN THE MATTER OF C. HURD AND H. SELDEN, *administrators* OF
JESSE HURD, DECEASED, PROCEEDED AGAINST BY ATTACHMENT, AS
non-resident debtors.

(9 *Wend.*, 465. *Decided* 1833.)

An *attachment* does not lie against an *administrator* for a demand against his intestate, under the act against *absconding, concealed and non-resident debtors.*
The want of jurisdiction may be objected, even after the appointment of trustees.

ON the 30th of December, 1831, an attachment was sued out under the act authorizing proceedings against *absconding, concealed and non-resident debtors*, by which the sheriff of New York was commanded to attach and safely keep all the estate real and personal of Cyrus Hurd and Huntington Selden, *in their capacity of administrators* of Jesse Hurd, deceased; which attachment was issued by the first judge of the New York common pleas, on an affidavit that Cyrus Hurd and Huntington Selden, administrators of Jesse Hurd deceased, were *in their representative capacity* indebted to Francis Saltus and Nicholas Saltus upon contract, in the sum of \$2,333.58, and that they were non-residents of this State. Notice to the debtors to appear was duly published for nine months; on the 28th November, 1832, *trustees* were appointed, and on the 15th December following, the judge before whom the proceedings were had made a *report* of his proceedings to this court. The persons proceeded against as non-resident debtors now apply to set aside the attachment, and all subsequent proceedings. They show that the domicile of their intestate was in Connecticut; that he died on the 21st of July, 1831, in the city of New York, where, for a long time previous, he had carried on business; that on the 3d of August, 1831, letters of administration upon the estate of the intestate were granted to both of them in Connecticut, and on the 18th of the same month letters of administration upon the same estate were granted by the surrogate of New York to C. Hurd, one of the parties.

J. Leveridge & W. Darling, for the motion.

J. L. Wendell & H. Bleecker, contra.

By the Court, NELSON, J.	*	*	*	*
* * *	*	*	*	*

It appears that the persons proceeded against as *non-resident debtors* are the *personal representatives* of a deceased debtor, and that the warrant of attachment was issued against them in their *representative character*. It is insisted on their behalf, that the statute limits this remedy to a debtor *individually*, and does not warrant proceedings against his *personal representatives*. This is undoubtedly the true construction of the act. In *Jackson v. Walsworth*, 1 *John's Cas.*, 372, it was holden that the then existing statute respecting absent debtors did not warrant proceedings against heirs, executors, trustees or others claiming merely by right of representation. The statute is now much more explicit than it was previous to the revision, and from a note of the revisors we are warranted in the conclusion that its phraseology was altered to conform to the decision in *Jackson v. Walsworth*. The language of the act is, "Such application (i. e., the application for the attachment), may be made by any creditor resident within the State, or out of it, or by his personal representatives, having a demand against such *debtor personally*," &c. 2 *R. S.* § 3, speaking of the debtor in his *individual* character, in contradistinction to the *representative* character of an executor or administrator. It is also worthy of remark, that although in this very section the remedy by attachment is given to the personal representatives of the *creditor*, it is not given *against* the personal representatives of the *debtor*, which it is fair to presume would have been done, had such been the intention of the legislature. A subsequent section, however, removes all doubt as to the intention of the legislature: By the 64th section, page 13, it is enacted, that if a debtor against whom a warrant of attachment has issued, shall *die* before the time limited for his appearance, the proceedings on the warrant shall be stayed and the property seized shall be delivered to his *personal representatives*. Had it been contemplated that the representatives of a deceased debtor might be proceeded against under this statute, this provision would not have been found in the statute, and on the contrary, provisions would have been made for the continuance of the proceedings against the representatives. In view of this explicit enactment that the proceedings already commenced shall stay in case of the death of the

debtor, and that the property seized shall be delivered to his personal representatives, the language of the previous sections should be strong and imperative indeed, to warrant the conclusion that proceedings may *originally* be instituted against representatives. Instead of being so, they appear to me to justify no other construction than that an attachment can issue only against a debtor for a demand against him *personally*, or in his *individual character*. According to this view of the question, the officer who issued the warrant of attachment had not jurisdiction, and consequently the warrant improvidently issued. * * * *

* * * * *
 * * * * * The want of jurisdiction appears on the face of the proceedings; and this court, having power to correct any errors therein and to make such order as shall seem just, are bound to do so without regard to the seeming *laches* of the administrators. The attachment and all subsequent proceedings thereon are set aside.

SUPREME COURT.

FITCH v. DEVLIN.

(15 Barb., 47. Decided 1853.)

Where a summons, issued by a justice of the peace, was, during the absence of the defendant from home, served upon his son, and the justice, without any appearance by the defendant, rendered a judgment against him, the constable having returned the summons personally served: *Held*, that the judgment might be reversed on appeal, the error of fact appearing by affidavit.

The correctness of the decision in *Putnam v. Man* (3 Wend., 202), doubted by PARKER, J.

The remedy by appeal is applicable as well to cases of jurisdictional defects as to those of mere irregularity.

THE plaintiff sued the defendant in the justices' court of the city of Troy. The summons was returned by the constable personally served, and on the return day the plaintiff appeared, put in his complaint, and introduced evidence on which the justice gave judgment against the defendant for \$8.18 damages and \$1.21 costs. The defendant did not appear before the justice. The

defendant appealed to the Rensselaer county court, and after alleging certain errors in law, he also alleged as error in fact that the summons was not served on him. It was shown by affidavits before the county court that previous to the issuing of the summons the defendant left his residence in the city of Troy, and went to the city of New York, where he remained until after the summons was returned; and that during his absence the summons was served on the son of the defendant. The county court affirmed the judgment of the justice, and the defendant appealed to this court.

J. H. Reynolds, for the plaintiff.

R. A. Parmenter, for the defendant.

By the Court, PARKER, J. The summons issued by the justice was never served on the defendant. It was served on his son, during the absence of the defendant from home. The constable, however, made a return of personal service on the defendant, on which the justice proceeded *ex parte*, and rendered judgment. Though the facts alleged were clearly established by the affidavits, and are not controverted by the plaintiff, it is contended that they afford no ground for relief on appeal, and that the only remedy of the defendant is by an action against the constable for a false return. Such was the view taken of this case by the county court.

The case principally relied on by the plaintiff, is that of *Putnam v. Man* (3 *Wend.*, 202). It was there held that in an action of trespass for an arrest under an execution, it was not competent for the plaintiff to contradict the return by showing that the summons had never been in fact served upon him, but that if the return of personal service was false, the remedy was by action against the constable, for a false return. In that case the party sued was a constable, and as such had falsely returned that he had personally served the summons in the action in which he was plaintiff. That decision was made, as appears from the opinion, with considerable hesitation. I have never been satisfied of its soundness, and have had occasion recently to express my doubts with regard to it. Though a return of personal service makes out, *prima facie*, a case of jurisdiction over the person of the defendant, yet, if the sum-

mons were not in fact served, no jurisdiction could have been, in fact, acquired. I do not see upon what principle jurisdiction can be obtained over a person who has had no notice, either actual or constructive, of the proceeding. He can be no more bound by a false return than by a forged return. It would be an intolerable hardship to confine a defendant to a remedy for a false return, against an irresponsible constable, and not to allow him to hold the judgment void. In such case the justice also acted upon papers apparently sufficient, and should be protected. The same protection should be extended to him that was given to a constable in *Savacool v. Boughton* (5 *Wend.*, 170). It was said by Bronson, J. in *Bruen v. Bokee* (4 *Denio*, 58), "A man should *never* be concluded, or put to any damage, by a judicial proceeding, when he has had no opportunity to be heard." That principle should never be violated.

But it is not necessary, in this case, to controvert the correctness of the decision in *Putnam v. Man*. The question here is not whether the judgment may, in another suit for such omission, be held void, but whether it may be reversed for such error, on appeal.

In *Allen v. Martin* (10 *Wend.*, 300), the plaintiff offered, on the trial, to impeach a judgment, by proving that the summons was served by Martin, and that he intentionally misread it and informed the plaintiff it was returnable on the *eleventh*, when in fact it was returnable on the *tenth* day of August, and thus obtained the judgment by the practice of a fraud. The court held that such evidence was properly excluded; and Nelson, J. said, "The case of *Putnam v. Man* (3 *Wend.*, 202), disposes of the question. There can be no doubt the judgment before the justice cannot be impeached in this collateral way, and that so far as its validity is concerned, the return of the service of the summons is conclusive, except on a direct proceeding to reverse the judgment for the irregularity. The party injured has an ample remedy either by action for a false return, or by writ of error. The case of *Putnam v. Man*, relied on by the plaintiff, is not at all applicable to a direct proceeding to reverse the judgment, for the irregularity," which is the remedy sought by the defendant in this case.

The right to reverse a justice's judgment for an error of fact not appearing on the record, has always been secured to the party, in some form. In *Harvey v. Rickett* (15 *John.*, 87), which was a cer-

tiorari to a justice's court, the plaintiff in error assigned for error the misconduct of the jury in ascertaining the amount of damages, which was done by each of the jurors marking down a particular sum, and then dividing the whole amount by six; for that error the judgment was reversed. And in *Rose v. Smith* (4 Cowen, 17), the justice's judgment was reversed on the fact assigned for error that spirituous liquor had been circulated among the jury, by the defendant, and was drank by them while they were sitting together on the trial.

It was supposed the revised statutes, by authorizing a *certiorari* to a justice's court to be brought on to argument without any assignment or joinder in error (2 R. S., 275, § 180), had abolished assignments of errors of fact as well as of law; but it was held otherwise in *Williams v. The Albany Mayor's Court* (12 Wend., 267). In that case it was held that the party bringing the *certiorari* might properly assign for error in fact the misconduct of the jury in making up their verdict. Nelson, J. said, "It would be intolerable if misconduct of the jury, or improper practices of the parties, not coming under the observation of the court below, could not be corrected; and they could not, but by the use of an assignment of error in fact." The necessity for such relief is recognized and a remedy provided by section 366 of the code, as follows: "If the appeal is founded on an error in fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the justice, the court may determine the alleged error in fact on affidavits, and may, in its discretion, inquire into and determine the same upon examination of witnesses." This is the substitute provided for all cases in which the error does not appear on the record, and in regard to which the remedy was formerly by an assignment of error of fact.

This remedy on appeal is applicable as well to cases of jurisdictional defects as to those of mere irregularity. Although a party is at liberty to treat a judgment or proceeding as void for want of jurisdiction, he may also seek a reversal of the proceedings by *certiorari* or appeal. (*Starr v. Rochester*, 6 Wend., 564.)

The error in fact being in this case clearly established, the judgment of the county court and of the justice are both erroneous, and must be reversed.

NEW YORK SUPERIOR COURT.

HOLBROOK, NELSON & Co. v. HENDERSON.

(4 *Sand.*, 619. *Decided* 1851.)*D. Lord, Jr.*, for the defendant.*M. S. Bidwell*, for the plaintiffs.

OAKLEY, J., delivered the opinion of the court.

The defendant in this case is the ambassador of the republic of Texas, sent by his government on a mission to the courts of France and England, and received and accredited as such at these courts. Having negotiated a treaty with France, he is now on his return to Texas, with the treaty, to lay it before the Congress of that country, now in session, for its ratification; and he has with him the regular credentials of his official station, which are to be considered as laid before us. On his arrival in this city he has been arrested and held to bail on civil process, issued out of this court, at the suit of the plaintiffs. It does not appear when or where the debt, on which the suit is founded, was contracted, nor is it necessary to inquire, according to the view I take of the case, any further than to infer, as I presume the fact is, that it has not been contracted since his late arrival in the United States.

Upon this state of the case, the question is submitted to us, whether the defendant is entitled to be discharged from this arrest, and whether the process against him ought to be set aside. The defendant contends that he is entitled to such discharge, because he is privileged from arrest as an ambassador of a sovereign power, traveling through the country in the execution of the duties assigned to him by his sovereign. On the other hand, it is contended, that such privilege applies only to an ambassador or public minister deputed to this country by a foreign state, and residing here as such.

It is not questioned that a resident minister, received and acknowledged by the executive of the United States, is not subject to the civil jurisdiction of our courts. It is clear that this privi-

lege is founded, not on any municipal law of this country, but on the law of nations. The act of Congress of April, 1790, (which is in substance like the English act,) cannot be construed as intended to *confer* this privilege. Its object is to enforce it, first, by declaring all process issued by any court against such minister void, and secondly, by inflicting punishment upon all persons who may be instrumental in violating the minister's privilege. That such must be the construction of the act, is to my mind clear, from the fact that its provisions are confined to the case of a minister who has been received and acknowledged by the executive authority; from which it would follow, if the act is considered as creating or granting the exemption, that a public minister arriving on a mission to our government and residing here would not be entitled to any of the privileges of a minister until he should present his credentials, and be publicly received by the president. Now that a minister, thus situated, is entitled to the most important privileges which attach to him after his public reception, is clear, both from the opinions of the most approved writers on the law of nations, and from the reasons on which such privileges are founded. It was proper that the act of Congress should be confined to the case of a minister after his public reception, inasmuch as it makes penal the acts of our own citizens, which may be in violation of his privileges, and this could not be done with justice, until the existence of those privileges should be made known by his public acknowledgment by the government.

I cannot, therefore, yield my assent to the argument, which has been pressed upon us, that the act of Congress has limited the extent to which the privilege of a foreign minister may be enjoyed. I do not suppose that it was intended to abrogate any part of the generally received and acknowledged principles of international law on that subject.

Assuming, then, that the privileges of a foreign minister have their origin and support in the law of nations, it becomes necessary to inquire into the reasons on which that law is founded. They are, in substance, as I find them laid down in *Vattel*, that it is necessary for nations to treat with each other for the good of their affairs—that each has a right of free communication with others for that purpose—that such communication must, of necessity, be carried on by ministers or agents who are the representatives of

their sovereign, and that each sovereign state has, therefore, a right to send and receive public ministers; that such being the rights of nations, a sovereign attempting to hinder another from sending or receiving a minister, does him an injury and offends against the law of nations. That, the minister representing the sovereign by whom he is deputed, the respect rendered to the minister is not personal merely, but is, in truth, the respect due from one sovereign to another; and to withhold it is, therefore, an insult which may justly be resented, and thus the peace of nations may be endangered.

It is further laid down that the right of embassies, being thus established, the inviolability of ambassadors is a certain consequence of that right, and is indispensable to the perfect enjoyment of it. That such inviolability may be complete, it is necessary that the ambassador should be free from the control or operation of the laws of the country to which he is sent, and from the jurisdiction of its courts, as without such freedom he might not be able to discharge his duty to his own sovereign with firmness and fidelity. It is further laid down that inasmuch as the minister is the representative of the dignity and independence of the sovereign, it is impossible to conceive that such sovereign in sending an ambassador intends to submit or subject him to the authority or jurisdiction of a foreign power.

Without dwelling further on this summary of the law of nations, relative to the rights and privileges of public ministers, it is sufficient to observe that the principles contained in it are not only obviously just, but that all the approved writers on international law, both before and since *Vattel*, concur fully with him as to their nature and extent.

Vattel, following out these principles, to what, I think, is their legitimate result, holds that an ambassador, passing through the territory of a friendly power, on a mission from his sovereign to another friendly power, is entitled to at least some of the rights and privileges of ambassadors. He says that, although the prince to whom the minister is sent is under a particular obligation that he shall enjoy all the rights annexed to his character, yet others, through whose dominions he passes, are not to deny him those regards to which the minister of a sovereign is entitled, and which nations owe to each other. They especially owe him an entire

safety. To insult him would be injuring his master, and the whole nation; to arrest him and offer violence to him, would be hurting the right of embassy which belongs to all sovereigns. According to *Vattel's* opinion, then, the principles of international law on which the rights and privileges of resident ministers rest, apply to a case like the one now before us, so far as to secure to the minister an entire personal safety, and freedom from arrest, and violence, or, in other words, from all restraint of his personal liberty, whereby he may be prevented from discharging his duties to his own sovereign.

This view of *Vattel* recommends itself very strongly to my judgment. It is founded in good sense and sound reason. It is difficult to designate any principle among those before stated, as sustaining the rights of a resident minister to be exempted from arrest or a restraint of his personal liberty, which does not apply to the case of one standing in the situation of this defendant. The ambassador of the republic of Texas is traveling through our country, which is in amity with his own, in the actual discharge of a special duty, assigned to him by his sovereign. He is the representative of the dignity and independence of Texas as a sovereign state. Passing through our territory on his route to his own country, to complete the mission with which he has been charged, he cannot be presumed to have laid aside his official character, and to have voluntarily submitted himself to the jurisdiction of our courts, as he could not do that without failing in his duty to his own sovereign. His arrest and detention, and, perchance, his personal imprisonment for an indefinite period, might seriously interfere with the successful termination of his mission. The free right of embassy which Texas, in common with all other nations, enjoys, may thus be impaired, and she may feel that an insult has been offered to her dignity, and an injury to her rights, and thus a state of things arise, which may endanger the national peace. It seems to me, that every principle of national courtesy, of a just observance of the rights and dignity of independent sovereign powers, and of a due regard to the preservation of public peace and of the maintenance of friendly intercourse with other nations, calls upon us to extend to the present case the established rules of that law of nations, which, by the consent of all, secures the inviolability of a

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resident ambassador. The two cases seem to me to be equally within the reason of the law.

In thus adopting the doctrine of *Vattel*, I, of course, have not overlooked the fact, that most, perhaps all the other writers on international law, to which we have referred, have advanced different views. The most distinguished amongst them, *Grotius* and *Wicquefort*, unite in the opinion, that a public minister, passing through the territory of a third power, is not entitled to any privileges as such, and if my decision were to be governed by the mere weight of the opinions of learned men, I should probably arrive at a conclusion different from that which has resulted from my examination of the subject. But as mere opinions, they do not address themselves to us with the authority of judicial decisions, and are to be regarded only as they seem consonant with sound reason. I am not satisfied with the grounds on which these writers sustain their opinions, or with the cases to which they refer for their support. Those cases cannot be considered according to any reasonable view of the subject, as amounting to satisfactory evidence of the practice and usage of nations. The most that can be said of them is, that they are instances of violence, apparently acquiesced in, or to speak more properly, submitted to, in some cases after remonstrances against their legality, and, in all, from motives which cannot be known. They may have been motives of expediency merely, or motives springing from the necessary submission of the weak to the powerful. But in no case happening in times sufficiently modern to be entitled to respect as a precedent do I find, that the violation of the person of an ambassador, traveling through the territory of a power at peace with his sovereign, has been acknowledged by that sovereign not to be a breach of the general law of nations. And after all, the practice of nations at a remote period, and the opinions of the old writers on national law, seem to me to be entitled of themselves to little weight with us. The law of nations, like other systems of law, is progressive. Its principles are expanded and liberalized by the spirit of the age and country in which we live. Cases, as they arise under it, must be brought to the test of enlightened reason and of liberal principles; and I should as soon think of going back to the times of the English star chamber, to search for the rules that ought to govern us in the protection of the personal liberty or rights of the private citizen, as of

referring to the age of Charles V. or of Elizabeth, for the principles which ought to regulate the intercourse of nations.

It was urged, on the argument by the counsel for the plaintiffs, that the exemption claimed in this case could not rest on that necessity of preferring the free intercourse of nations, which alone can justify it, inasmuch as it was not necessary that the Texian ambassador should have entered our territory on his return from Europe. And that, therefore, his coming into our country was in fact voluntary, and a virtual submission, on his part, to the ordinary operation of our laws while within our borders.

It is true that the defendant might have returned to his own country without passing through ours ; but we cannot but see that such a course would have been unusual, and probably highly inconvenient. He is returning by the ordinary and established route—that which, in practice, is adopted by almost all men, both public and private. There is at present little or no direct intercourse between Texas and Europe, and it would be treating the subject in a point of view altogether too narrow, to hold that the defendant, by adopting the ordinary and convenient mode of traveling to and from his place of destination, had thereby intended to abandon his official character, and to enter our territory as a mere private individual. It may happen, as in the case of some of the German States and of the Swiss Cantons, that a public minister, deputed to them, must, from absolute necessity, pass through the territory of a third power. In such a case, the refusal of a free passage through such territory would be a clear violation of that free right of embassy spoken of by *Vattel*. The obligation to permit such passage would therefore seem to be positive, and in the exercise of national courtesy it ought to be permitted by the usual and most convenient route. Any unnecessary impediment thrown in the way of the free passage of the minister impairs the right of embassy possessed by his sovereign. The same principle will justly apply to the case now before us. The right of free communication between nations, which has its foundation in public necessity, is in truth a right to be enjoyed according to a convenience exercised in good faith, and in reference to the usual and established mode of intercourse.

It was further contended on the argument, that the privilege claimed by the defendant is in conflict with the well-established

right of every nation to exclude from its territories all persons at its pleasure. I do not so consider it. Our government may undoubtedly, if it should see fit, send out of the country any resident minister. So may they do with the present defendant. They may direct him to leave our territory, but they cannot arrest and imprison him. In the one case he may return to his own country and complete the objects of his mission, in the other his mission would be interrupted, and, perchance, entirely defeated.

It is also contended, that before an ambassador, passing through our country, on a mission to another power, can claim an exemption from the ordinary operation of our laws, it should at least appear that he had entered our territory by the permission of our government; and most of the writers on international law, who deny the right of a minister, in the situation of the present defendant, to the privilege claimed for him, seem to agree that if a minister thus situated obtain a passport or safe conduct, as such, from the sovereign of the territory through which he is about to pass, his right of protection by such sovereign becomes absolute. This must be so, according to every sound view of the case. If a sovereign invite or permit the representative of another power to enter his territory for any purpose, it is clear that he cannot, without a violation of all good faith, withhold from such representative all necessary protection. Now, may it not fairly be said that the present case falls within this principle? The practice of granting passports, or a safe conduct, to any person, except in time of war, is, as far as I am informed, unknown to our government. No man, I believe, being about to enter our country, either to reside in it or pass through it, ever thinks of applying for permission to do so. Passports, though they may be named in our laws, are entirely unknown in practice, or of extremely rare occurrence. The truth is, that every subject or citizen of a foreign power finds a passport for entrance into our country, in the nature and character of our political institutions. We hold out a standing invitation to all men to come freely among us, and it is doing no violence to good sense or sound reason to say, that foreigners enter our country by, at least, the implied invitation of our government. The defendant, then, could not, in reason, be required to obtain any express consent of the government to come within our territory, in order that he might, when here, enjoy the privileges claimed by him as

appertaining to his representative character, so long, at least, as that government permits him to remain.

In coming to the result at which I have arrived in this case, I have not considered, nor do I intend to say, what is the extent of the privileges which may be justly claimed by the defendant. It may be, that many privileges clearly secured to a resident minister, as for example, those which refer to his domestic establishment, may not be necessary for the protection of a minister merely passing through the country, in the enjoyment of his personal freedom.

Nor do I intend to say whether the defendant may not, by his continuance in the country, or by his conduct while in it, divest himself of his representative character, so far as by his voluntary act to subject himself to the ordinary operation of our laws. These are questions not involved necessarily in the present inquiry.

I am of opinion, that the motion to set aside the process issued in this case and that the defendant be discharged, be granted.

SUPREME COURT.

LEWIS HERGMAN AND ADOLPH ALEXANDER v. MORITY DETTLEBACH
AND OTHERS.

(11 How., 46. Decided 1855.)

COWLES, *Justice*. It seems to be well settled that on *fi. fa.* against one of several partners, the co-partnership property may be seized, and the interest of the judgment debtor in same sold by the sheriff; but subject to an accounting among the partners, on dissolution. (*Phillips v. Cook*, 24 Wend., 387; *Waddell v. Cook*, 2 Hill, 47; *Walsh v. Adams*, 3 Denio, 125.) And I see no reason why the same principle does not apply to the case of an attachment under the Revised Statutes.

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SUPREME COURT.

GROAT v. GILLESPIE & GIBBONS.

(25 *Wend.*, 383. *Decided* 1841.)

THIS action was brought by attachment defendants against attachment plaintiff on the latter's bond that he would pay all damages and costs which the former might sustain by reason of the issuance of the attachment, if he (the attachment plaintiff) should fail to recover judgment. A shanty was seized by virtue of the attachment, but not removed. The value of the shanty was shown to be sixty dollars, and the jury rendered a verdict for that amount under the charge of the judge that the measure of damages in such an action was the value of the shanty.

J. McKown, for the defendants.

J. Holmes, for the plaintiff.

By the Court, NELSON, C. J. The ruling at the circuit was clearly erroneous. The plaintiff was entitled only to the damages actually sustained in consequence of the attachment, and nothing more. The condition of the bond carries the remedy no further, according to its terms.

The ground of the recovery, is not that the proceedings have been irregular and void on the part of the plaintiff in the attachment, but that he has *failed to recover a judgment*. So far as respects the remedy in this form, it is wholly immaterial whether they be regular or not. The breach has no necessary connection with the fact.

The measure of damages, therefore, in trover or trespass, as in the case of an *illegal* levy, was improperly applied. Upon the facts in this case, I do not see that the plaintiff was entitled to anything more than *nominal damages*.

New trial granted.

SUPREME COURT.

LEAVITT D. GARRISON AND ALLIS W. OGDEN, Respondents, v. A.
W. MARSHALL, Appellant.

(44 *How.*, 193. *Decided* 1871.)

AN attachment cannot legally issue under the Revised Statutes, from a justice's court, unless it satisfactorily appears to the justice that the debtor has departed or is about to depart from the *county where he last resided*, with intent to defraud his creditors or to avoid the service of any civil process, or that he keeps himself concealed with the like intent.

If the application is under the law of 1831 it should satisfactorily appear to the justice that the defendant is about to remove his property *from the county*, with intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of, or secrete his property, with the like intent, whether such defendant be a resident of the State or not.

Where the affidavit stated, that the defendant had departed, and was about to remove his property from the county, with the intent to defraud his creditors, it was *held* that the allegation of the departure, &c., would bring the case under sec. 26 of the Revised Statutes, while the allegation of the removal of the property, &c., would bring the case under sec. 34 of the Non-imprisonment Act.

Under sec. 26 of the Revised Statutes, it is necessary to show the departure of the defendant from the county where he last resided. Under sec. 34 of the law of 1831, it is necessary to show, either that the defendant is a resident or a non-resident of the State.

W. H. Warren and *H. Ballard*, for appellant and defendant.

Duell & Foster, for respondents and plaintiffs.

By the Court, MILLER, P. J. This action is brought against the defendant, as a constable, for neglecting to levy upon personal property, by virtue of an attachment against one Woodruff.

The defence interposed is, that the attachment was issued without authority, and was, therefore, void and of no effect.

It is urged that the justice did not acquire jurisdiction to issue the attachment, because it nowhere appears either in the application, or in the affidavits, in what county the debtor resided, nor is there any allegation that he has departed, or is about to depart, from the county "where he last resided," as provided by the statute (2 *R. S.*, 230, § 26), providing that an attachment against the

property of any debtor may be issued "whenever it shall satisfactorily appear to the justice that such debtor has departed, or is about to depart from the *county where he last resided*, with intent to defraud his creditors, or to avoid the service of any civil process, or that such debtor keeps himself concealed with the like intent." Additional cases were provided for by the non-imprisonment act, and it was enacted that actions might also be commenced by attachment, "when it shall satisfactorily be made to appear, that the defendant is about to remove *from the county* any of his property with intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of, or secrete any of his property with the like intent, whether such defendant be a resident of this State or not." (*S. L. of 1831, chap. 300, § 34, as amended by S. L. of 1842, ch. 107; 3 R. S., 5 ed., 462, 463, § 216.*)

The application for the attachment, as appears from the affidavit of the plaintiff's agent, was upon the grounds, that "the said George Woodruff has departed, and is about to remove his property from the said county of Cayuga, with the intent to defraud his creditors."

The portion of the application stating that the defendant in the application had departed, &c., would bring the case under sec. 26 of the Revised Statutes; while the latter clause presents a case under sec. 34 of the non-imprisonment act.

As the last section makes provision for other cases besides what had previously been provided for, sec. 26 remains in force, subject to the changes made in favor of additional cases by sec. 34.

As the application for the attachment was partially under sec. 26, it should have been made to appear by the affidavits, that the defendant had departed "from the county where he last resided."

So also, as it sought to make out a case within the provision of sec. 34 of the non imprisonment act above cited, the papers should have shown either that the defendant was a resident of the State, or a non-resident.

These facts were essential to give the justice jurisdiction to issue the attachment, and without one or the other of them, no case was made out within either section of the several statutes quoted.

It is nowhere stated in what county the defendant last resided, so as to make out a case within sec. 26.

This is absolutely essential (*Tucker v. Malloy*, 48 *Barb.*, 88, 89),

nor is it shown whether he was a resident or non-resident, so as to answer the requirements of section 34.

When the application is made for an attachment against a non-resident, the party applying must make an affidavit of the fact of non-residence, and when no such affidavit is furnished, the judgment will be reversed (*Taylor v. Heath*, 4 *Denio*, 592).

The affidavits utterly fail to comply with either of the statutes in question. The agent of the plaintiff swears that the defendant "had departed, or is about to remove his property from the said county of Cayuga," without previously stating that he lived there, or where he did reside, or whether he was temporarily there, or passing through Cayuga county, or that he was a non-resident.

The naming of the county is a mere reference to the county in which the affidavit is entitled, which is given at its commencement. Although the affidavits are entitled: "Cayuga County, town of Locke," they do not show in any way where the property was, in what town or county, from whence it was to be removed.

There is nothing in fact in either of the affidavits to show or to indicate that the property of the defendant, which it was alleged he was about to remove, may not have been in some other county or even some other State, where they could not be reached by any attachment issued by a justice of the peace of Cayuga county.

The affidavits showing conversations with the defendant's wife, and the packing up of the goods, do not state where the conversations took place, or where the goods were packed up to be removed. There is nothing, therefore, in the papers, from which it may fairly be inferred where the defendant in the attachment resided, or whether he was a resident or non-resident of the State.

There is no rule better settled in this State than that on proceedings of this character, the statute must be substantially complied with in order to confer jurisdiction.

It is unnecessary to cite authorities in support of a proposition so plain and so well understood. It is evident that the defects referred to, were of a jurisdictional character which rendered the attachment void, and that the justice acted without authority in granting it. The defendant, therefore, was not bound to serve it, and was not liable for a neglect to do so.

Several other objections are urged to the proceedings, but inasmuch as the error adverted to is fatal to the judgment, it is not

important to discuss them. For this error the judgment of the justice and the county court must be reversed with the cost of appeal.

PARKER and JAMES, JJ., concurred in the result.

IN CHANCERY.

HATHAWAY v. SCOTT.

(11 *Paige*, 173. *Decided* 1844.)

J. J. Monell, for the complainant.

W. L. F. Warren, for the petitioner.

The CHANCELLOR * * * * * * *
 * * * * * * *

But the objection that the petition is not signed by the party who swore to it, is well taken. To identify the individual making the oath, he is required to sign the paper to which he swears, so as to facilitate a prosecution for perjury if the oath is false, and bills, answers, petitions and affidavits in this court must be subscribed by the party who verifies them. Where the verification of a bill or petition is in the form of an affidavit, the name of the deponent must be subscribed at the foot of the affidavit. But where the verification is in the form of a certificate of the officer who administered the oath, that the deponent swore to the truth of the bill or petition, the name of such deponent should be subscribed to the bill or petition. For without such signature it would be very difficult, if not impossible, to sustain a prosecution for perjury; especially where no persons other than the deponent and the officer administering the oath were present when the former was sworn.

I am aware that the supreme court long since decided that it was sufficient, in that court, if the name of the deponent was inserted in the commencement of the affidavit. (3 *Caines' Rep.* 190. 3 *John. Rep.* 540.) That might perhaps answer the purposes of identifying the deponent and the instrument, if the whole affidavit was in the deponent's handwriting. But those decisions,

even if they are considered good law in the supreme court, at this time are not so here. For the practice in the court of chancery, in requiring the deponent's signature, was founded upon a positive rule, made as early as 1661, and which has been followed ever since. By one of Lord Clarendon's orders, the deponent was required to subscribe his name, a mark, to the affidavit before it was certified by the master. (*Beames' Orders*, 210. 2 *Har. Pr.* 2. *Wyatt's Pr. Reg.* 8. 1 *Grant's Pr.* 240. 1 *Newl. Pr.* 237.)

* * * * *

BUFFALO SUPERIOR COURT.

FRANK MORGAN, Respondent, v. GEORGE HOUSE, Appellant.

(36 *How.*, 326. *Decided* 1868.)

Upon an application for an attachment under the thirty-third section of the non-imprisonment act, an affidavit is required, showing the amount of the debt, and that it arises upon contract; that the defendant is a non-resident of the county; and that no warrant can issue.

The affidavit must state facts and circumstances sufficient to prove the jurisdictional fact that "*no warrant can issue*"—the statement that the demand arises "upon contract," merely, does not show this.

C. H. Park, for appellant.

W. W. Rowley, for respondent.

By the Court, MASTEN, J. This is an appeal from a judgment rendered in a justice's court.

The action was commenced by attachment under the thirty-third section of the act to abolish imprisonment for debt. The only question in the case arises upon the sufficiency of the affidavit upon which the attachment issued.

It was at one time a mooted question whether the statute required that the grounds on which an attachment under that section is authorized to be issued should be shown to the justice by affidavit. The supreme court without much consideration held that no affidavit was required or necessary.

In *Taylor v. Heath* (4 Denio 592), Judge Beardsley reviewed those decisions and carefully examined the provisions of the statute bearing upon the question. He showed that such an affidavit was required by the statute, and that there was no authority to issue an attachment under that section without it. In the report of the case it is said that Judges Bronson and Jewett concurred in the opinion of Judge Beardsley, that the judgment of the justice's court should be reversed on the ground that it *did not appear in any way*, that the defendant was a non-resident, without expressing any opinion whether the statute required an affidavit in such a case. No one can read the statutes and the opinion of Judge Beardsley, without becoming satisfied that Judge Beardsley reached the right conclusion.

He says: "An attachment under section 33 is authorized because the defendant is a non-resident, *and one against whom no warrant can issue*, but these facts and circumstances must be proved by affidavit."

The court of appeals put the question at rest by adopting the conclusion of Judge Beardsley. *Bennett v. Brown* (4 Comst. 254).

In *Van Kirk v. Wilds* (11 Barb., 520), the supreme court held that an affidavit of the non-residence of the defendant was necessary to confer jurisdiction upon the justice to issue the attachment, but that it was not necessary that it should show that no warrant could issue. The learned judge who delivered the opinion in that case, does not give the question much examination.

Van Kirk v. Wilds is in conflict with *Bennett v. Brown*, and was decided before *Bennett v. Brown* was reported, and probably in ignorance of it, for it is not alluded to.

Van Kirk v. Wilds must be considered as overruled.

The 33d section is, "whenever by the provisions of the thirtieth section of this act, *no warrant can issue*, and the defendant shall reside out of the county, he shall be proceeded against by summons or attachment." The act also contains the following provision: "Before any attachment shall issue * * * * the plaintiff shall by his own affidavit or that of some other person, prove to the satisfaction of the justice, the facts and circumstances to entitle him to the same."

The court of appeals in *Bennett v. Brown* (*supra*), held that this provision applied to attachments under section thirty-three.

To justify the issuing of an attachment under section thirty-three an affidavit must be presented to the justice showing a demand arising upon contract and the amount of it over all discounts, that *no warrant can issue*, and that the defendant resides out of the county. 2 R. S. 230; *Laws* 1831, 396; *Bennett v. Brown* (*supra*).

The affidavit in this case is as follows :

“Erie county, ss: Frank Morgan being duly sworn says, that he has a demand against the defendant George House, arising upon contract, amounting to over twenty-four dollars over and above all discounts, and that the said George House is a non-resident of Erie county.”

It is claimed that this affidavit is defective in not showing that the demand is one for which “no warrant can issue.” By the thirtieth section referred to, no person can be arrested “upon any demand arising upon contract express or implied,” unless it be for money collected by a public officer; or, for any misconduct or neglect in office; or, in any professional employment.

To state that the demand arises upon contract, does not show that it is a case in which by the provisions of section thirty “no warrant can issue,” for it may be one of the excepted cases.

An action by a client against his attorney for money collected by the latter for the former, is upon a demand arising upon contract and yet it is a case in which a warrant can issue; and in which consequently an attachment under section thirty-three is not authorized. *Stage v. Stevens* (1 Den., 267).

The affidavit must state facts and circumstances sufficient to prove the jurisdictional fact that the case is one in which by the provisions of the thirtieth section, no warrant can issue.

The affidavit in this case is in that particular defective.

That the demand is one for which no warrant can issue, may be shown by stating that it is one arising upon contract, and is not for money collected by a public officer, or for any misconduct or neglect in office, or in any professional employment, or by stating for what the demand is, as for work and labor, or goods sold, or money lent, &c.

The judgment must be reversed.

SUPREME COURT.

SHERWOOD v. THE SARATOGA & WASHINGTON RAILROAD COMPANY.

(15 Barb., 650. Decided 1852.)

A railroad corporation, whose road passes through two or more counties, may be sued before a justice in either county, provided the process can be served on the proper officer in such county.

A railroad company must be treated as an inhabitant and freeholder in each county where its track is laid. Therefore a summons, issued against such a company, by a justice of the peace, must be made returnable not less than six nor more than twelve days from the time of service.

A summons, returnable within three days from its date, is a nullity. The justice has no jurisdiction over the corporation, as a non-resident.

It is irregular for the same person to appear as attorney for both parties, on the return of a summons issued by a justice.

It should appear by the return to a summons issued by a justice against a corporation in what manner the process was served, so that the justice may be able to determine whether it was served on the proper officer.

* * * * *

THIS was an appeal by the defendant from a judgment of the Washington county court. The cause was originally commenced before a justice of the peace, to recover damages for an injury to the plaintiff's land in overflowing the same by the construction of the railway, embankments, &c., adjoining the same. The justice gave a judgment for the plaintiff, for \$61.75 damages, besides costs; and on appeal, the county court affirmed the judgment.

W. L. F. Warren, for the appellant.

Wait & Parry, for the plaintiff.

By the Court, WILLARD, P. J. This suit was commenced on the 29th of July, 1850, by summons returnable on the 1st of August, which was returned served, by Bushrod W. Sherwood, a constable of the town of Fort Edward, on the 29th of July, 1850. On the return day the parties appeared, according to the justice's return, by the same attorney and joined issue, and the suit was adjourned till the 10th of August, at 10 A. M.

The amended judiciary act of December, 1847 (*Laws of 1847*,

p. 646, § 45), repeals so much of the act of 1830, as to the jurisdiction of justices of the peace, as prohibited them from entertaining an action against corporations. (2 *R. S.* 226, § 4, *sub.* 5.) The act of 1847 prescribes that the process by which any suit shall be commenced before a justice, against a corporation, may be served on the presiding officer, secretary, cashier, treasurer, or any director or trustee thereof. The revised statutes provide that the first process against freeholders, &c. shall be by summons, returnable not less than six nor more than twelve days from the time of service. (2 *R. S.* 227, 228, §§ 13, 14, 15.) They provide also in the same section that no person shall be proceeded against by summons out of the county in which he resides. The justice, in this case, must have treated the defendant as an inhabitant of Washington county. The summons therefore was a nullity, being returnable within three days from its date.

This is not a case where a short summons was admissible under § 33 of the non-imprisonment act. (*Laws of 1831, p.* 403.) That section gives a short summons against a defendant only in cases where the defendant resides out of the county and cannot be proceeded against by warrant under the 30th section of the same act. The defendant was not exempt from arrest by virtue of the 30th section, but from the very nature of its being. The justice had no jurisdiction of the corporation as a non-resident. It is only upon the notion that the corporation might be treated as an inhabitant of Washington county, that he could entertain jurisdiction at all. In my judgment a railroad corporation, whose road passes through two or more counties, may be sued before a justice in either county, provided the process can be served on the proper officer in such county. A railroad company must be treated as an inhabitant and freeholder in each county where its track is laid.

This process, being irregular, was not cured by the appearance on the return day of it. The justice states that both parties appeared by the same attorney. The 45th section of the statute (2 *R. S.* 238) requires the authority to appear by attorney to be either written or verbal, and that it must in all cases be proved, either by the attorney himself or other competent testimony, unless admitted by the opposite party; and the justice shall not permit any person to appear for another, without such proof or admission. It was irregular for one attorney to appear for both parties. The

practice is of dangerous tendency and should be discountenanced. Even in taking judgment by confession on bond and warrant of attorney, it was never allowed for the same person to act for plaintiff and defendant. Here the plaintiff served his own summons, and his attorney appeared for the defendant without showing any authority.

I think it should also have appeared how the summons was served, so that the justice might have been able to determine whether it was served on the proper officer. For these reasons the justice did not obtain jurisdiction of the cause. There was no subsequent appearance of the parties, in person, nor by attorney whose authority was proved according to law, to give jurisdiction to the justice over the cause.

* * * * *

Without, therefore, looking into the evidence that was given, I am of opinion that, for the foregoing reasons, the judgments both of the justice and of the county court should be reversed.

Judgment reversed.

COURT OF APPEALS.

STAPLES v. FAIRCHILD.

(3 *New-York Rep.*, 41. Decided 1849.)

J. L. Talcott, for appellant.

S. G. Havens, for respondent.

JEWETT, Ch. J. The Revised Statutes (2 *R. S.* p. 3, §§ 1, 2, 3, 4, 5, 6,) provide for attaching the real and personal property of a debtor for the payment of his debts, in the following cases: 1. Whenever such debtor, being an inhabitant of this State, shall secretly depart therefrom, with intent to defraud his creditors, or to avoid the service of civil process, or shall keep himself concealed therein, with the like intent. 2. Whenever any person not being a resident of this State, shall be indebted on a contract made within this State, or to a creditor residing within this State,

although upon a contract made elsewhere. The first point made in this cause involves the question, whether Judge Wilson, who issued the attachment upon the application of Giles Sanford, by virtue of which the premises in question were seized and subsequently sold, and under which the plaintiff claims title, had jurisdiction. Section four of the statute provides that the application to the judge for such attachment shall be in writing, verified by the affidavit of the creditor, or of the person making the same, in his behalf, in which shall be specified the sum in which the debtor is indebted over and above all discounts, to the person in whose behalf such application is made, and the *grounds* upon which the application is founded.

The application for an attachment against the property of Bradley was probably intended to be predicated upon the facts that the creditor was a *resident* of this State, or that the contract upon which the indebtedness arose was *made* within this State and that the debtor was a resident of the State of Connecticut. Sub. 2 of § 1 of the statute gives jurisdiction to the judge to issue the attachment only in cases where the debtor is not a resident of this State, and is indebted upon contract to some person *residing* within this State or to some person upon contract *made* within this State. These facts the statute requires to be stated in the application and to be verified before the judge to whom the application is made, by the affidavit of the creditor or of the person making the application in his behalf as the ground for issuing the attachment or warrant. Although the application of Sanford, the creditor, was in writing and verified by his affidavit; and in it was specified the sum in which Bradley was indebted to him, over and above all discounts, and that such demand arose upon contract, and that Bradley was not a resident of this State but a resident of the State of Connecticut; it does not state, as the grounds upon which the application was founded, either that Sanford *resided* within this State, or that the indebtedness of Bradley to him arose upon a contract *made* within this State. It was first said on the argument that it was not necessary that the *residence* of the creditor should be stated in the application. That would be true in a case where the *residence* of the creditor was not the ground relied on, to give jurisdiction to the officer to issue his warrant or attachment. Where the application omits to state that the residence of

the debtor is within this State, to show jurisdiction in the officer, it must state that the contract upon which the indebtedness arose, was *made* within this State. It is not enough to specify the sum of the indebtedness, that it arose upon contract, and that the debtor was a non-resident of this State. But to give jurisdiction to the officer, it must also be stated in the application, either that the creditor *resides* within this State; or that the indebtedness arose upon a contract *made* within this State.

It was next said that if it was necessary that the residence of the creditor should be stated in the application, it was sufficiently stated in the application made by Sanford. In describing the applicant in the application presented to Judge Wilson for the attachment or warrant, it was stated, "the petition of Giles Sanford, of the city of Albany, respectfully sheweth," &c. and the affidavit verifying it stated that "Giles Sanford, of the city of Albany, being duly sworn says, that he has a demand against Scudder Bradley of \$866.94 personally, arising upon contract, over and above all discounts; and that the said Scudder Bradley resides at Westport, in the county of Fairfield, in the state of Connecticut, or elsewhere out of the State of New York, and further this deponent says not." It is obvious that the application contains no statement or averment in express terms that Giles Sanford resided at Albany. But if the recital, contained in the application, of his being "of the city of Albany," could be held to amount to a positive or express statement of the residence of Sanford, that fact is not verified by his affidavit; there is no *oath* to the fact of his residence. The affidavit merely verified the fact of the indebtedness of Bradley to Sanford; that it arose upon contract; and that Bradley was a non-resident of this State, and resided in Connecticut. (*Ex parte Bank of Monroe*, 7 Hill, 177.) The requirements of the statute are not complied with, unless the grounds upon which the application is founded are expressly stated and verified by the affidavit prescribed by the statute; and whether residence of Sanford in this State, or that the contract upon which the indebtedness arose was made in this State, was one of the grounds, is not stated in the application in terms, or in any form verified by the affidavit.

It was, however, contended on the argument that the appointment of trustees in that proceeding, was conclusive evidence of

the regularity of the previous proceedings, and 2 R. S. 13, § 62 was cited to sustain that point. It is as follows: "Such appointment of trustees, the record thereof, and the transcript of such record duly verified, shall in all cases, except on hearing of a petition referred to any court as hereinbefore provided, be conclusive evidence that the debtor therein named was a concealed, absconding or non-resident debtor, within the meaning of the foregoing provisions, and that the said appointment and all the proceedings previous thereto, were regular." This section is a copy of a part of the 26th section of the former act (1 R. L. 163), which declared that the appointment of trustees should be conclusive proof in all courts that the debtor was at the time *absconding, concealed or absent*, within the meaning of the act, and that the appointment and proceedings previous thereto were regular. I think that a correct construction was given to this section by the supreme court in the *Matter of Hurd*, 9 Wend., 465, where it was said, that its effect was to preclude all inquiry into the regularity of the proceedings, and to estop the party from denying that he was an *absconding, concealed or absent* debtor; but that it did not debar him from contesting the jurisdiction of the officer, or insisting that his case is not within the statute.

Section five of the statute makes it necessary that the facts and circumstances to establish the grounds upon which such application is made, shall also be verified by the affidavit of two disinterested witnesses. It was contended that the witnesses must be proved to be disinterested, and that it could not be presumed, to sustain the jurisdiction of the officer. The case made by the proof of the applicant showed that the debt was due from Bradley to him, and nothing appeared that the two witnesses had any interest in the debt; but on the contrary, it appeared affirmatively that neither of them had any interest in it. Having no interest in the debt, the law will presume them disinterested *prima facie* at least. The fact of the non-residence of Bradley was verified by the affidavits of the two witnesses, and that was the only part of the case which, by the true construction of section five, is required to be verified by the affidavits of two disinterested witnesses. (*In the Matter of Brown*, 21 Wend., 316.)

There was a total defect of evidence as to one fact, essential to give the justice jurisdiction; that is, that the residence of Sanford

was within this State, or that the contract, upon which the indebtedness of Bradley to Sanford arose, was made in this State. There was conferred upon Judge Wilson a special and limited jurisdiction. It is well settled that when certain facts are to be proved to a court having only such a jurisdiction, as a ground for issuing process, if there be a total defect of evidence as to any essential fact, the process will be declared void, in whatever form the question may arise. But when the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, then, although the proof may be slight and inconclusive, the process will be valid until it is set aside by a direct proceeding for that purpose. In one case the court acts without authority ; in the other, it only errs in judgment upon a question properly before it for adjudication. (*Miller v. Brinkerhoff*, 4 *Denio*, 119, and the cases there cited. *Den v. Turner*, 9 *Wheat.*, 541.) In one case, there is a defect of jurisdiction ; in the other, there is only an error of judgment. Want of jurisdiction makes the act void ; but a mistake concerning the just weight of evidence, only makes the act erroneous, and it will stand good until reversed.

The attachment or warrant issued by Judge Wilson, having been issued without jurisdiction, was void. The subsequent proceedings fall with it, and therefore the plaintiff failed to show any title to the premises in question. The judgment of the Supreme Court must be affirmed.

COURT OF APPEALS.

PAYNE v. YOUNG AND OTHERS.

(8 *New-York Rep.*, 158. *Decided* 1853.)

S. Beardsley, for the appellant.

N. Hill, Jr., for the respondent.

JEWETT, J. The plaintiff, it is claimed by the defendants, was proceeded against by them on the ground that they were residents of the city and county of New York and that he was a resident of the State of Pennsylvania. The material question made for determination, is, whether an application made to the recorder of New

York, for an attachment, *stated that the applicants were residents of the city and county of New York.* For unless it did, the attachment and all subsequent proceedings under it, it is well settled, must be held to be void.

The application commences thus: "The application of Charles L. Young, Jeremiah B. Taylor, and James W. Healey, all of the city of New York," &c. "respectfully shows," &c. It is verified by the affidavit of Jeremiah B. Taylor, thus: "Jeremiah B. Taylor, one of the above applicants, being duly sworn says, that the *matters stated* in the above application, are true of his own knowledge." It is insisted that the fact that the applicants were all residents of the city of New York, is stated in the application, and that it was duly verified because the affidavit of Taylor, verifies all of the *matters stated* in the application. I think it is a mistake to say that the fact of residence of the applicant, is a matter *stated* in the application; and therefore there is no oath to the fact of residence. It is a jurisdictional fact. There are many decisions in our court, holding uniformly, that the averment of facts upon which jurisdiction in such and similiar cases depends, must be positive, and that it is not sufficient that jurisdiction may be inferred, argumentatively, from what appears in the application or petition. This case cannot, as I think, be distinguished in principle from the case of *Staples v. Fairchild*. The judgment must be affirmed.

SUPREME COURT.

NICOLLS v. INGERSOLL.

(7 *John.*, 145. *Decided* 1810.)

* * * * *

Bail may break open the outer door of the house, in order to take the principal; his power is analogous to that of the sheriff, who may break open an outer door to take a prisoner who has escaped from arrest.

* * * * *

Van Buren & Woodward, for the plaintiff.

E. Williams, contra.

THOMPSON, J., delivered the opinion of the court. * *

* * * * *

Bail, in the language of the books, are said (6 *Mod.*, 231) to have their principal always upon a string, which they may pull whenever they please, and surrender him in their own discharge. They may take him up, even upon a Sunday, and confine him until the next day, and then surrender him. The doing so on Sunday is no service of process, but rather like the case where the sheriff arrests a party who escapes, for that is only a continuance of the former imprisonment. Lord Hardwicke says (1 *Atk.*, 237; *Ex parte Gibbons*), it is the constant language of courts, that bail are their principals' *gaolers*, and that it is upon this *notion* that they have an authority to take them; and that, as the principal is at liberty only by the permission and indulgence of the bail, they may take him up at any time. The same principle is recognized in *Shower* (*Anonymous case*, 214), where it is said by the court, that bail are but *gaolers, pro tempore*; and in case a man absconds and his bail cannot find him, they shall have a warrant to take him out of any pretended place of privilege, in order to surrender him, because he is a prisoner to the court, and they may call him at pleasure. If the principal is to be considered as standing in the situation of a prisoner who has escaped from the arrest of the sheriff, according to the language of one of the cases, can there be any reasonable doubt but a sheriff, in such case, would have a right to pursue and arrest his prisoner, in a neighboring State; and, by parity of reasoning, bail must have the like authority. The cases I have referred to are sufficient to show that the law considers the principal as a prisoner, whose gaol liberties are enlarged or circumscribed, at the will of his bail; and, according to this view of the subject, it would seem necessarily to follow, that, as between the bail and his principal, the controlling power of the former over the latter may be exercised at all times and in all places; and this appears to me indispensable for the safety and security of bail.

Another question presented was, whether the bail had a right to break open the outer door of the plaintiff's house to make the arrest. The verdict authorizes us to presume, that a demand was made before entry; for this fact was submitted to the jury as being necessary to be shown by the defendant to render the entry lawful. That the bail may break open the outer door of the principal, if neces-

sary, in order to arrest him, follows, as a necessary consequence, from the doctrine, that he has the custody of the principal ; his power is analogous to that of the sheriff, who may break open an outer door to take a prisoner who has escaped from arrest. But the case of *Shears v. Brooks* (2 *H. Black.*, 120), goes the whole length of this doctrine. Lord Loughborough there says, when a party is bailed, the bail have a right to go into the house of the principal, as much as he has himself. They have a right to be constantly with him, and to enter when they please, and take him. The right to break open the plaintiff's house in the case before us, is fortified by the circumstance of his having been taken a few days before, on the bail-piece. His situation, in point of fact, as well as in judgment of law, was somewhat analogous to that of a party escaping from arrest.

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COURT OF APPEALS.

JENCKS v. SMITH.

(1 *New-York Rep.*, 90. *Decided* 1847.)

* * * * *

Where, upon a trial there is opportunity for objection, and the party whose duty it is to object remains silent, all reasonable intendments will be made, in a Court of Review, to uphold the judgment.

* * * * *

H. G. Wheaton, for plaintiff in error.

Wm. J. Hough, for defendant in error.

WRIGHT, J.— * * * * *

2d. That there was no proof on the trial before the justice, of the residence of the mortgagor, at the time of the execution of the mortgage ; or that, when executed, the property was in the town in which the mortgage was filed.

* * * * *

The act of 1833, chapter 279, provides that every mortgage, or

conveyance intended to operate as a mortgage of goods and chattels, thereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void, as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the town or city where the mortgagor, if a resident of this State, shall reside at the time of the execution thereof; and if not a resident, then in the city or town where the property so mortgaged shall be at the time of the execution of such instrument. It is now insisted that there was no proof on the trial of the residence of the mortgagor, nor did it appear that the mortgage was filed in the town where the property was at the time of its execution. If the return of the justice showed affirmatively that this proof was wanting, and that objection was raised, before the justice, on account of the absence of it, the defect would be fatal. But the return is merely silent on the point, and no objection appears to have been taken before the justice. Where opportunity is given for objections, and none are made, but the party whose duty it is to object *remains silent*, all reasonable intendments will be made by a court of error to uphold the judgment. This doctrine, founded in good sense, has been promulgated in a series of decisions by the courts of this State. In the case of *Baldwin v. Calkins* (10 Wend., 167), on *certiorari*, the Supreme Court held that an omission to object will even authorize the inference of a fact necessary to confer jurisdiction.

In *Menderback v. Hopkins* (8 John., 436), a constable, having an execution, paid the amount to the plaintiff, without any demand of, or request by, the defendant, and afterwards sued the defendant for the money so paid. There was no evidence on the trial that the constable had made a demand on the defendant, or that he had been requested by him to make the payment. The Court said, "a demand and request may have been presumed. It was to be inferred as admitted, when nothing was said to the contrary. Indeed, as no objection was made to any of the testimony, but it was submitted to the jury, every inference that could be drawn from the evidence, is to be presumed to have been drawn, and the verdict, by reasonable intendment, is good." In *Fort v. Monroe* (20 Wend., 210), case was

brought for negligence of a servant of the defendant in driving a gig, by which a son of the plaintiff was run over and killed. There was no evidence to show that the servant was acting in the business of the master, or within the scope of his authority, nor was that point made upon the trial, either on a motion for a nonsuit, or after the testimony had closed. On a motion for a new trial, the Supreme Court remarked: "The case seems to have been tried and defended upon the assumption of the existence of the relation of master and servant between the defendant and the person driving the carriage. It would, therefore, be unreasonable to disturb the verdict upon the ground now urged, as the counsel did not choose to avail himself of it when it could have been removed, by his adversary, by the production of proof." In *Oakley v. Van Horn* (21 *Wend.*, 305), the collector of a school district was sued, in a Justice's Court, in trespass, for levying upon and selling a saddle for a school tax. In the return of the Justice it did not appear that any evidence was given to show that before the levy the collector demanded the payment of the tax, nor on the other hand did it appear that the absence of such proof was objected to or in any way noticed on the trial. The collector had judgment and the Supreme Court, in affirming it, say: "If we are authorized to hold, from the return, that no demand was made of the tax in question, previous to the levy, and that the point was duly raised in the Justice's Court, there was error. But in the case at bar, the return is merely silent as to the proof of demand. No objection appears to have been made on that account, nor does it appear, affirmatively, that the proof was wanting. We must intend, therefore, that it was given. Had the objection now raised come before us on a bill of exceptions, it must have been shown affirmatively that the collector failed to justify by proving a demand before he levied; and beside, that the defect was mentioned as an objection, for it is one that may be supplied, and we would intend that had the objection been raised it would have been obviated by proof of the fact. Here the parties were present with every opportunity to raise the point." In *Holbrook et al. v. Wright* (24 *Wend.*, 169), it was necessary for the plaintiffs to sustain their action, to prove that they had accepted or paid certain drafts. There was no direct evidence in the case as to the acceptance or payment, nor was there any objection on

that ground raised on the trial. On a motion for a new trial, Cowen, Justice, who delivered the opinion of the court, held the following language: "It is said there is no evidence in the case, that the plaintiffs had either accepted or paid the drafts. There is not, indeed, any direct evidence, but the fact of acceptance was assumed throughout the trial. The Judge referred to it in his charge to the jury. It is strange, if such a material fact were out of the case, that it was not mentioned as an objection and made a point."

In the present case the fact seems to have been assumed throughout the trial that Arnold was a resident of the town of De Ruyter at the execution of the mortgage; and no objection appearing upon the return, I think we should intend that it was proved or admitted. Clearly upon principle, aside from direct authority, it ought not to be tolerated, that parties should go to trial in a Justice's Court, raising no objections in its progress, or at its close, when any defect in the proof, if pointed out, might be obviated, and afterwards, being dissatisfied with the verdict, an Appellate Court should be urged to reverse the judgment of the Justice on an allegation of such defect.

The judgment of the Supreme Court should be reversed, and that of the Common Pleas and Justice affirmed.

SUPREME COURT.

HAFF v. SPICER & POTTER.

(3 *Caines*, 190. *Decided* 1805.)

If an affidavit begins with a deponent's name it is a good signing.

STARR took exception to the affidavit on which the defendant moved, because it was not subscribed by him.

Per Curiam. It begins with his name, and that is sufficient.

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COURT OF APPEALS.

ROBERT A. SMITH, FRANCIS S. ALTEMUS, & ISAAC HYNEMAN, Appellants, v. JOHN ORSER, SHERIFF OF THE CITY AND COUNTY OF NEW YORK, Respondent.

(42 *New-York Rep.*, 132. *Decided* 1870.)

It is the duty of an officer, in executing a warrant of attachment upon the interest of one member of a partnership, to take into his possession the partnership property.

There is no distinction in this respect, between an attachment and an execution.

W. W. *McFarland*, for the appellants.

A. J. *Vanderpoel*, for the respondent.

E. DARWIN SMITH, J. It can scarcely be doubted, I think, that the ruling of the judge at the circuit, that the sheriff, under attachment against two members of a partnership consisting of three members, had no right to take and hold possession of the partnership property, was in conflict with well settled law in this state.

The warrant of attachment, issued under section 231 of the Code, expressly required him to attach and safely keep all the property of the defendants, Smith & Hyneman, within his county.

The property of these two members of said firm it was his clear duty to seize and safely keep, to answer any judgment that might be rendered in such action (*section* 232). He could not perform his duty and make the process effectual without taking the property of the partnership into his possession. It appears that the same learned judge who tried this cause, and made the ruling aforesaid at the circuit, had occasion to examine this question a few months afterward ; and in a careful General Term opinion, upon a review of the cases, in *Goll v. Hinton* (8 *Abbott*, 122), said : "It is now well settled law in this State that on an execution against one of several copartners, for his individual debt, the sheriff may seize the entire leviable property of the copartnership, and sell as much of the interest of his judgment debtor as may be sufficient to satisfy the execution. To do this he may take manual possession of the copartnership property."

In *Phillips v. Cook* (24 *Wend.*, 389), this question received from

Judge Cowen a very elaborate discussion, and the case directly holds that the sheriff may, in such case, seize and take possession of the entire partnership effects, and may sell the interest of the partner against whom the execution is issued ; and that an action of trespass will not lie against the sheriff at the suit of the other partners for delivering to the purchaser the property sold. This case has been recognized and approved in *Waddell v. Cook* (2 *Hill*, 48, and note *a*) ; *Mowbray v. Lawrance* (13 *Abbott*, 318), and in other cases, and has never been seriously questioned, I think, in any well considered case in this State. A rule so long established and acquiesced in, and of such practical consequence, I think, should rarely be changed, except by the legislature.

There is no distinction in principle between an attachment and an execution, in respect to the duty of the sheriff to seize and take into his possession the chattel property of the debtor in the due execution of the process.

The order setting aside the verdict, and directing a new trial, should be affirmed, and judgment absolute be ordered for the defendant.

LORT, J. If the process under which the property in question was taken had been an execution, instead of an attachment, it would have been a perfect justification to the defendant within the decisions of *Scrugham v. Carter* (12 *Wendell*, 131) and *Phillips v. Cook* (24 *id.*, 389), &c. In the last case the question was very elaborately and ably discussed by Cowen, J., and after a careful and critical examination of it both on principle and authority, he came to the conclusion, as well expressed in the head note, that on an execution against one of two partners, the sheriff may seize the entire partnership effects, or so much thereof as may be necessary to satisfy the execution, and sell the interest of the partner against whom the execution is issued, and an action of trespass will not lie against a sheriff at the suit of the other partner for delivering to the purchaser the property sold ; and in the discussion he said the true rule was laid down by Holt, Ch., J., in *Pope v. Haman* (*Comb.*, 217) : " Upon a judgment against one partner the sheriff may take the goods of both in execution and the other copartner hath no remedy at law otherwise than by retaking the goods, if he can ; for the vendee of the sheriff becomes tenant in

common with the other partner;" and he recognized the correctness of the decision in *Scrugham v. Carter*, *supra*, where it appeared that the entire partnership property was taken possession of by the officer under an execution against one partner only, and the court held that replevin would not lie by the assignees of the firm claiming under a voluntary assignment to them.

The first of those decisions was made in 1834, and the last in 1840, and must be considered as overruling that made in the matter of *Smith, &c.* (16 *John.*, 102), decided in 1819, so far as it held a contrary rule. They have been since acquiesced in, as controlling authority in this State, and I see no reason for questioning the principle established by them.

Assuming, then, the rule as above stated to be correct, it appears to me that the principle thereby established must apply to and govern proceedings on attachments. The authority to the sheriff under each process is to take the property of the defendant, against whom it is issued. No more power is given under an execution than under an attachment. The latter remedy is intended to give the party in whose favor it is issued, a lien on the property of the debtor, to be made available on a sale of it under an execution, upon the recovery of judgment, and, in the language of Welles, J., in *McKay v. Harrower* (27 *Barb.*, 463), "is more in the nature of the former writ of *fiery facias* as to its object and effect than of any other common-law writ. It is in effect an initiatory execution against the defendant's property before judgment and issued in anticipation thereof;" and he adds: "When the execution comes he does not levy, for that has already been done by authority of the attachment, so that the attachment and execution together contain the same and no more authority or force than a common writ of *fiery facias*;" and this court held in *Rinchev v. Stryker* (26 *How. Pr. Rep.*, 75), that a sheriff had a right to show, in an action against him for a levy under such attachment, that the title of a purchaser claiming title from the defendant, was fraudulent and void as against the attaching creditor as fully and with like effect as if the levy had been made under an execution.

It may be added that the sheriff is directed to proceed on such attachments in all respects in the manner required of him by law in case of attachments against absent debtors. (*See Code*, § 232.) And it is provided by the statute applicable to the latter that "if

any goods or effects seized as the property of the debtor, other than vessels, shall be claimed by or on behalf of any other person as his property, the sheriff shall summon and swear a jury to try the validity of such claim in the same manner and with the like effect as in case of seizure under execution", clearly indicating that the right of the sheriff to seize the property is the same under each process. (2 *Rev. Stat.*, p. 4, § 9.) The right was recognized and declared under a similar provision, under the former act, for relief against absent and absconding debtors (1 *Rev. Laws*, p. 168, § 4), by the decision in *Mersereau v. Norton* (15 *John. Rep.*, 179), in which it was held that, under an attachment issued in pursuance thereof, the sheriff might take and sell property, of which an absconding debtor was only a tenant in common with another, when the property was found in the possession of the other co-tenant, and the court in the matter of *Smith*, *supra*, considered such attachment analogous to an execution.

Although that authority is questioned (if not overruled), so far as it decides that the entire property may be sold, by the case of *Waddell v. Cook* (2 *Hill*, 47), the court recognized the principle declared in *Phillips v. Cook*, *supra*, by saying that, while the authority of a sheriff acting under an execution "extends to a total dispossession of both the co-tenants by an execution against one, yet the same law denies him the right to sell the entire property."

The authority of a sheriff under an attachment issued under the Code, against one party only, was fully considered in *Goll v. Hinton* (8 *Abbott's Pr. Rep.*, 120); and Davies, P. J., in giving the opinion of the court at General Term, after saying that no reason could be suggested why any property subject to seizure and sale on execution could not be taken on an attachment for the same purpose, and presenting several other considerations in the application, said in conclusion: "We think, therefore, that in this State, the analogy holds between attachments and executions, and that whatever property the sheriff may take under the latter process, he may seize and take under the former."

The question is again ably considered by Leonard, J., in the present case, and, without adding anything further, we deem it sufficient to say that we adopt the views presented by him, and

concur in the conclusion that the judge erred at the trial in directing the jury that the sheriff had no right under the attachments to take or hold possession of the property. It follows that the order of reversal must be affirmed, with costs, and judgment absolute must be rendered against the plaintiffs, under their stipulation to that effect, with costs; and it having been suggested on the argument that the defendant had died since the filing of the return to the appeal to this court, judgment should be entered as of a day anterior to his death.

All concur for affirmance except Sutherland, J., who, having been a member of the court below, did not vote.

SUPREME COURT.

DUNNING v. HUMPHREY & CLARK.

(24 Wend., 30. Decided 1840.)

THIS was an action on an *attachment bond*. Answer—no damage except as to \$10, and as to that a tender before suit brought. Plaintiff demurred.

' *M. T. Reynolds*, for the plaintiff.

S. Stevens, for the defendant.

By the Court, NELSON, Ch. J. The plea is bad, as the action is brought for the recovery of unliquidated damages. Besides the costs of defending the attachment suit, the plaintiff here is entitled to such damages as a jury may think he has sustained by the wrongful seizing and detaining of his property. If it was taken out of his possession, he may be entitled to the value of it; if seized and left in his possession, to such damages as may be awarded for the unlawful intermeddling with the property.

Judgment for the plaintiff.

COURT OF COMMON PLEAS.

JOHN SMITH v. WILLIAM M. ALLEN, IMPLEADED, &c.

(2 *E. D. Smith*, 259. *Decided* 1854.)*J. Wilson Green*, for the plaintiff.*William Allen*, for the defendant Wm. M. Allen.

WOODRUFF, J. It is not doubted by the counsel for the respondent in this case, that all proceedings under the execution issued on the judgment rendered in the Marine Court were stayed, by perfecting the appeal and the service of a certified copy of the undertaking thereon upon the officer who held the execution. In this respect the effect of such service is declared in the Code (§ 357), in almost the very words employed in the Revised Statutes in declaring the effect of the allowance of a writ of error and an order to stay proceedings upon such judgment. (2 *R. S.* 597, § 30.) Nor that before the Revised Statutes, if a writ of error were sued out within four days after judgment, or within such time as might be allowed by an order extending the time, it operated as a *supersedeas* of the execution, according to the cases of *Jackson v. Schaubert*, 7 *Cowen*, 417, 490; *The People v. N. Y. Common Pleas*, 1 *Wend.*, 81, and note; and *Mitchell v. Thorp*, 5 *Wend.*, 288. And it appears from those cases, that an order would be granted by the court setting aside an execution which was issued and served within that period, if the writ of error was brought and bail in error duly perfected. While in *Beekman v. Bemus* (7 *Cowen*, 418), it was, on the other hand, held, not only that (in conformity with the previous cases) a writ of error issued after the four days did not supersede an execution, but that where the four days had elapsed without any order giving time or staying the effect of the judgment in this respect, and an execution had been issued and levied, the court had no power to interfere therewith nor stay proceedings thereon.

The Revised Statutes, obviously having in view this distinction between the effect of the writ issued within the four days and a writ issued after the four days have elapsed, and the want of power in the court to stay proceedings in the latter case, enact a uniform

rule, applicable to all writs of error *whenever* issued: To wit, that upon the allowance of a writ of error, the officer should (if the writ be intended to operate as a stay of execution, and the proper bond be executed), indorse on the writ an order to stay proceedings on the execution, if one shall have been issued, or to stay the issuing of one, if none have been issued. And thereupon, by § 30 it is enacted, in almost the words of § 357 of the Code, "If no execution shall have been issued, the service of such order shall stay the issuing thereof; and if an execution shall have been issued, and *not fully executed*, the service of such order shall stay the *further* execution thereof, at whatever time such order shall have been made or served."

The perfecting of an appeal from the Marine Court, and the service of a certified copy of the undertaking on appeal, it is declared in the Code, shall, if execution have been issued, "stay further proceedings thereon." We must, I think, hold that the construction and effect of these two statutes are the same. Whatever the legislature meant should be the effect of the service of "an order to stay proceedings on the execution," is now effected by the service of a certified copy of the undertaking on appeal. Staying "the further execution thereof," seems to me to have the same import as staying "further proceedings thereon."

The question presented in the present case is, whether the service of the copy undertaking on the appeal has the effect to discharge the execution, and take from the officer who has levied upon goods, all right to detain them under his levy; or, in other words, whether, upon such service and a demand of the goods levied on, he is bound to give up the goods to the defendant in execution.

Although the provisions of the Revised Statutes relating to the removal of judgments from courts of justices of the peace by *certiorari*, or by appeal (2 R. S. 255 and 258), do not apply to the marine or justices' courts of this city (*see p.* 267, § 231), yet, inasmuch as the review of judgments of all these courts is now regulated by the same act (*Code, chap.* 5), it is proper to notice that on allowance of a *certiorari* to the court of a justice of the peace, it was provided that the service of the *certiorari*, bond, and affidavit required, should stay the issuing of an execution, if none had been issued; and if an execution had been issued, but not

collected, the justice should grant a certificate which, on being served on the officer, should "suspend such execution" (2 R. S. 256, § 176); and on appeal (under article 11th), the appellant having given proper security, it is provided that "all further proceedings before the justice *shall be superseded*;" and if execution have been issued, the justice shall give a certificate, upon the presentation of which, the constable "shall forthwith release the goods and chattels" on which the execution may have been levied, or the body, as the case may be. In this last case the legislature expressed their intention to discharge the levy unqualifiedly. (2 R. S. 259, §§ 192-93.) (See *Wilson v. Williams*, 18 Wend., 581, and *Seymour v. Dascomb*, 12 Ib., 584, both decided under these acts.) Now, however, all modes of renewing such judgments are confined to the one appeal given by the Code; and the act defines the effect of the appeal on the proceedings below, by directing, in the language before that time applied to writs of error as above recited, that it shall stay all *further proceedings* on the execution.

The natural and most obvious import of the direction to "stay all further proceedings thereon," would seem to be that the officer should take no further steps, but suffer all things to remain as they are when the service is made. It certainly does not, on its face, import a setting aside of the execution, nor an affirmative command to discharge the levy and return the goods taken.

I find no express adjudication upon the construction of the like provision of the Revised Statutes on this precise question.

In *Sherrill v. Campbell* (21 Wend., 287), the sheriff having taken the defendant on a *ca. sa.*, and committed him to jail, was served with notice of the issuing of a writ of error and an order staying all proceedings upon the execution, and all further proceedings under the judgment, pursuant to the Revised Statutes, § 30, above referred to, and he thereupon suffered the defendant to go at large. In an action brought against the sheriff, he was held liable for an escape; but the opinion of the court is placed upon the ground that the arrest of the defendant on the *ca. sa.* was a *complete* execution of the process, and, therefore, staying the *further* execution of the writ, had no effect to discharge the defendant from custody.

In *Delafield v. Sandford* (3 Hill, 473), a motion was made to

vacate the order made on the allowance of the writ of error, and to compel the sheriff to *proceed to a sale*.

The court held that the order was promptly made, and that such order (*under 2 R. S. 597, § 30*), "*stays proceedings even after levy*," and that "there is no cause, therefore, for setting aside the order or *directing the sheriff to proceed*."

Whether the court would have directed the sheriff in this last case to relinquish his levy and give up the property to the defendant, was a question not raised, nor was any intimation given in respect to the duty of the sheriff in such case. It would seem, however, to have been true in fact that the sheriff at that time retained possession of the property.

While, therefore, these cases show that the sheriff is not bound to take any *further steps* under the execution pending the writ of error, they, neither of them, decide that the allowance of the writ of error and the order staying further proceedings have the effect to vacate or discharge what has been already done under it.

In my opinion the language of the statute and that of the Code is to be taken according to the meaning usually attached to such language in other proceedings in a cause, as a stay of proceedings until a motion be heard, or until security for costs be filed, or until the further order of the court, *i. e.*, that all proceedings of the party remain as they are, until the exigency contemplated by the order has happened.

When an appeal is taken, the stay may have the effect of a perpetual stay, if the judgment is reversed, because the foundation on which the execution rests is withdrawn.

That the legislature did not contemplate any other construction of the words, would seem inferable from the subsequent provisions of the Revised Statutes, wherein notice of the writ and the names and additions of the bail in error were required to be given, and the defendant in error permitted to except thereto. Whereupon, if the bail did not justify, the writ of error was, by the proper officer, superseded. In such case, I think, the execution might be further executed, and the officer proceed thereon without a new *fi. fa.* Otherwise, the security by a levy on property is lost, and no adequate security is had in the responsibility of bail in error who are unable to justify. So under the Code, § 341, a respondent on appeal to the Court of Appeals may except to the sureties in the

undertaking, and the section is explicit, that if they or other sureties do not justify "the appeal shall be regarded as if *no* undertaking had been given," *i. e.*, by § 334, the appeal shall not be effectual for *any* purpose. Can it be doubted that in such case the sheriff, if he had already received the execution, would be bound to levy under it; or, if he had levied, would be bound to proceed and sell the property? I think not. I think we should hardly be warranted in saying that *staying all further proceedings*, in section 357, means, in this respect, more than it does in section 339. If the giving of the undertaking has the effect to destroy the power of the sheriff over the property, the whole object of security on appeal would often be lost. If the appellant was able to obtain sureties who were irresponsible, he would nevertheless obtain his object by gaining re-possession of his property, though the sureties did not justify. For the stay of proceedings under the 339th section takes effect when the undertaking is filed and served.

It is argued, that where an undertaking on an appeal from the marine or justices' courts has been given, the cause is removed to this court, and the jurisdiction of the court below is ousted, and cannot afterward be regained, since no *remittitur* issues from this court directing the court below to proceed therein after affirmance.

There is no difference in the effect of an appeal on the power of the court below to execute its own judgment between the marine and justices' courts for this city and any other. If the undertaking be given, the proceedings are stayed. If not given, the court proceeds, notwithstanding the appeal, to issue execution, and the officer to levy and collect. So it was on writ of error, and so in all the courts. It is true that the respondent, on appeal, may have the judgment of this court, in affirmance of the judgment, and it may, perhaps, be that the whole judgment, with the costs of appeal, can be collected by execution issued out of this court, whether a transcript of the judgment has or has not been docketed with the county clerk. But if this be so, I perceive nothing which *requires* the respondent to proceed here, or forbids him from enforcing the judgment by execution from the court below. The appeal to this court may be dismissed for various causes without any judgment (whether an undertaking be or be not given), and if that be done, the court below will cause its own judgment to be executed. An order dismissing the appeal would terminate the stay of proceed-

ings, and the officer should, I think, proceed in the execution of the *fi. fa.*

It is further argued, that before the appeal is disposed of, the execution held by the officer will have expired, and, therefore, that it is unreasonable to suppose that the legislature intended that he should retain the custody of the property which he will never be able to apply to the execution. That his detention of the property in such case would be useless.

This argument assumes, that after levy the officer cannot sell after the return day named in the *fi. fa.* (*Vide* 3 *Dev.*, 428; 5 *Blackf.*, 590; *Gra. Pr.*, 388, 406, 407.) If this were so, such detention is not necessarily useless. The appeal may be dismissed before the return day, and if so, there seems to be no reason why the plaintiff in execution should lose the benefit of the levy. Nor is it impossible that the appeal should be heard and decided before the return day, that is, within sixty days after the judgment (*Code*, §§ 68 and 64, *subd.* 12), although this may not always happen.

I conclude, therefore, that the appeal and the giving of the prescribed undertaking and service of the copy thereof has the effect to arrest the proceedings on the judgment below, and on the execution, if any have been issued, and to suspend further action under the same until the appeal is disposed of. But that it does not discharge a levy previously made, and make it the duty of the officer to return the property to the hands of the defendant in execution. And that in this case the defendant Jones (the constable), was rightfully in the possession of the property until the decision of the appeal, and no demand of the goods having been made, after the reversal of the judgment whereon the execution was issued, the plaintiff was not entitled to recover in this action. The judgment should, I think, be affirmed.

COURT OF APPEALS.

SWEET v. TUTTLE.

(14 *New-York Rep.*, 465. *Decided* 1856.)

The distinction between pleas in abatement and in bar is abolished by the Code; and therefore the defendant may, in his answer, unite the non-joinder of a party as defendant, as a defence, with separate defences on the merits.

* * * * *

P. H. Green, for the appellant.

J. K. Porter, for the respondent.

COMSTOCK, J. The first question is, whether a defendant, along with other defences, may set up in his answer the non-joinder of other parties who ought to have been sued with him. Under the former practice, the non-joinder of defendants could be pleaded only in abatement, and could not be joined with a plea in bar; but under the Code there is no classification of answers or defences corresponding with the distinction between pleas in abatement and in bar. That distinction is entirely gone with the system to which it belonged. The defendant now answers but once, and he may set forth as many defences as he thinks he has, but must state them separately. (*Code*, § 150.) Among these is that of non-joinder, when it does not appear on the face of the complaint. (§ 147.) This is to be tried like any other defence, and its effect upon the suit is the same. A record showing that such a defence has been pleaded and tried, will not be a bar in another action between the proper parties, unless it be made to appear that the plaintiff was defeated on the merits of the controversy. But in the pending suit the meaning of the Code plainly is that it may be pleaded and tried as other defences are.

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COURT OF COMMON PLEAS.

HENRY J. TAYLOR AND OTHERS v. LYDIA HARKER AND ANOTHER.

(1 *E. D. Smith*, 391. *Decided* 1852.)

THIS action was commenced by attachment in the Marine Court of the city of New York. The grounds upon which the attachment was applied for, were, that the defendants were indebted to the plaintiffs on contract; that they were about to depart from the city of New York, where they last resided with intent to defraud their creditors; that they had disposed of their property with the like intent. The facts and circumstances stated in the affidavit were, that Lydia Harker had sold her property at auction and was about to remove and avowed a design to go to California. A bond was given and an attachment issued. The return of the constable was that he had attached \$175 belonging to the defendants, that was in the hands of D. S. Hough, and that he had served the attachment on Hough personally and on the defendants by leaving a copy, directed to them at their last place of residence, they being absent therefrom. Upon this return alone, the justice called the case. The defendants did not appear. Evidence was taken on part of the plaintiffs and judgment rendered in their favor. The defendants appealed.

N. B. La Bar, for the appellants.

Edmund Genin, for the respondents.

By the Court, WOODRUFF, J. This suit appears to have been commenced under the act of 1831, abolishing imprisonment for debt, and to punish fraudulent debtors, as amended by § 1 of chap. 107 of laws of 1842. This act is, by the 47th section thereof, made to apply to the marine and assistant justices' courts in the city of New York. (*See chap. 300 of laws of 1831, section 29 to 47.*)

Section 34 of the act authorizes an attachment when it satisfactorily appears to the justice, that the defendant is about to remove from the county any of his property, with intent to

defraud. In this case there was no evidence whatever laid before the justice of any intent to defraud, except that the defendant, Lydia Harker, had sold her property at auction and was about to remove. There was nothing in this to warrant the inference of fraud or fraudulent intent. The attachment was, therefore, as we think, improvidently issued. But without disposing of the appeal upon that ground, it is plain that the court below never acquired a jurisdiction warranting the further proceedings in the action.

Section 36 of the act of 1831, referring to the manner in which attachments issued by *courts of justices of the peace* were theretofore directed to be served, provides, in express terms, that if the defendant can be found in the county, a copy of the attachment and inventory, &c., shall be served on the defendant personally. This was not done in the present case. The return of the constable does not show that the defendants could not be found within the county, but only that when he left the copy at their "last place of residence," they were absent therefrom. This is not even *prima facie* evidence that they could not be found. It is wholly unnecessary to look at the affidavits of the defendants, but they nevertheless show clearly that the defendants were in the county, and might have been served.

This alone is fatal to the judgment.

But by section 38, it is further expressly provided, that if the attachment was not personally served, and the defendant does not appear, the plaintiff may take out a summons, and if the summons be returned, either personally served, or that the defendants *cannot be found after diligent inquiry*, then the justice shall proceed to hear and determine, &c. In this case no summons was issued, and the court below had no jurisdiction to proceed to hear, &c.

The judgment cannot be sustained upon any ground. It must be reversed, with costs.

SUPERIOR COURT, AT CHAMBERS.

JOHN C. WHEELER v. MRS. HARTWELL.

(4 *Bosw.*, 684. *Decided* 1860.)

THIS was an application for an order of arrest against the defendant, upon an allegation of fraud in contracting a board bill for herself and daughter.

BOSWORTH, Ch. J. denied the application, holding that the provisions of the Code, that "no female shall be arrested in any action, except for a willful injury to person, character or property" (*Code*, § 179), exempted the defendant from arrest in this action, although she may have fraudulently contracted the debt in question.

SUPREME COURT.

HOOSE v. SHERRILL AND OTHERS.

(16 *Wend.*, 33. *Decided* 1836.)

Where a *justice of the peace* justifies in an action of *false imprisonment*, under an execution on a judgment rendered by him, and in his plea sets forth that the first process in the suit before him was by *summons*, it is not necessary for him to allege that the defendant in such process was a *freeholder* or an *inhabitant having a family* in the county where he resides, or to negative the fact that he was a *non-resident*.

Where the first process is by *summons* when it should have been by *warrant*, the proceeding is not *coram non judice*, nor is the defendant remediless; advantage may be taken of the error by objection before the justice on the return of the summons, and if he err in deciding such objection, a *certiorari* lies.

FALSE imprisonment. The plaintiff declared in the usual form for an assault, battery and false imprisonment, against the defendant Sherrill and two other persons. Sherrill alone appeared to the action, and pleaded that at the time when, &c. he was a *justice of the peace* of the county of Tompkins, empowered to take cognizance of and to try actions for the recovery of demands of the value of fifty dollars or under, that the trustees of the village of Ithaca

applied to him to issue a *summons* against the plaintiff, according to the provisions of the act to incorporate the village of Ithaca, for an alleged violation of an ordinance or by-law of the village; that he accordingly issued a summons, in due form of law, to a constable of the county, commanding him to summon Hoose to appear before him, at his office, on the sixth day of June then next, to answer to the trustees of the village in a plea of debt. That the summons was duly returned by the constable, *personally served*, and on the day appointed the *trustees appeared* and declared in debt for a penalty of five dollars, for the violation of a village ordinance in relation to the market. That the cause was then adjourned, on the application of the trustees, until the next day, when, after hearing the evidence given in the cause, he rendered judgment in favor of the trustees for \$5 debt and \$2.24 costs, and in pursuance of the provisions of the act entitled "An act to amend the act entitled an act to incorporate the village of Ithaca," he ordered Hoose to be imprisoned in the common jail of the county of Tompkins for 30 days, unless the penalty and costs were sooner paid; and on the 10th July, 1834, at the request of the trustees of the village, he issued an *execution* on the judgment, commanding any constable of the county to levy the amount of the judgment of the goods and chattels of Hoose, and to bring the money before him, &c., and for want of goods and chattels whereon to levy, to take the body of Hoose and convey the same to the keeper of the common jail, who was commanded to receive Hoose and keep him until duly discharged according to law; and on the back of such execution made an indorsement, certifying that the judgment on which the same had issued was rendered for the violation of an ordinance of the trustees of the village of Ithaca in relation to the market, and directing the keeper of the jail to keep Hoose in close custody in the jail of the county, for 30 days, unless the judgment should be sooner paid. Which execution was delivered to Van Kirk, one other of the defendants, a constable of the county, to be executed; who, for want of goods and chattels whereon to levy, arrested Hoose and conveyed him to the jail of the county, where he delivered him to Cary, the remaining defendant in this cause, the keeper of the jail, who received Hoose and detained him three days, when he was discharged by the trustees of the village, which are the several supposed trespassers, &c., concluding with a verification

and prayer of judgment. To this idea the plaintiff interposed a general demurrer, and the defendant joined in demurrer.

M. T. Reynolds, for the plaintiff.

C. P. Kirkland, for the defendant.

By the Court, NELSON, C. J. A justice has jurisdiction to issue a *summons* as the first process in the commencement of a suit before him, *in all cases* where the defendant is a *freeholder or an inhabitant having a family* within the county where the justice resides. 2 R. S. 227, § 13. Whether it was, or was not, the appropriate process in this particular case cannot affect this general jurisdiction. If a summons be issued in a case in which it is not the appropriate process, the objection, to be available to the defendant in such process, must be taken before the justice, and if he errs in his decision, the remedy of the party is by *certiorari*; the proceeding will not be *coram non judice*. The general power will protect the magistrate and all officers concerned in the execution of the process from being treated as trespassers. The case of *Rogers v. Mulliner* (6 Wendell, 597), is an authority for this principle; see also *Savacool v. Boughton* (5 Wendell, 170). The summons was personally served, and whether there was a sufficient number of days between its issuing and the day of its return, is not material as it regards the defence in this case. The defect, if one exists, would go only to the regularity of the process, and not to the jurisdiction of the justice; it might be cause for reversal of the judgment, but does not render the process a nullity. The plea sets forth abundant facts to show jurisdiction of the subject-matter; it refers to the statute giving the penalty for which the plaintiff declared, and also to the remedy thereby prescribed. It also shows that the justice had jurisdiction of the person of the plaintiff. There must be judgment for the defendant, with leave to the plaintiff to amend.

Mr. Justice Cowen, concurred.

Mr. Justice Bronson, dissented.

SUPREME COURT.

ROSENFELD v. HOWARD.

(15 Barb., 546. Decided 1853.)

Where a plaintiff, applying to a justice of the peace, under the 34th section of the non-imprisonment act (*Laws of 1831, p. 396*), for an attachment against the defendant, presented an affidavit in which he alleged that the defendant was about to dispose of his property with intent to defraud his creditors, and assigned the existence of the following facts as evidence of that intent, viz., that the defendant left the county two months before, and went to Canada with intent to remain there, taking with him a portion of his goods; that he had no family and but little property; that he was offering his property for sale; that he had told the plaintiff that he would be glad if he ever got his pay of him; that no civil process could be served on him, because he kept out of the State; and that he refused to pay anything on the plaintiff's debt; *Held*, that these facts proved a strong case of *intent* to dispose of property to defraud creditors. That at least there was some evidence for the justice to act upon, in issuing an attachment; and that his proceedings would not be reversed for insufficiency of proof in that respect.

A return to an attachment issued by a justice under the non-imprisonment act, in which the constable states that he has seized the goods and chattels mentioned in the inventory annexed, and that *the defendant not being found in the county*, he left a copy of the attachment, &c., duly certified by him, with B. in whose possession the goods were found, "the defendant having no place of residence in the county of C." is sufficient, although it does not state specifically whether the copy of the attachment was, or was not, personally served on the defendant, as required by section 36 of that act.

Such a return will be understood as alleging that no personal service has been made; and will authorize the issuing of a summons against the defendant, by the justice, under the 38th section of the non-imprisonment act.

The fact that an affidavit upon which an attachment is issued by a justice, under the non-imprisonment act, contains facts which would have warranted an attachment under the revised statutes, is not a ground of error; provided the process actually issued is warranted by the affidavit.

THIS was an appeal by the plaintiff, from a judgment of the Chemung county court. The opinion which follows, sets forth all the material facts.

By the Court, SHANKLAND, J. The plaintiff proceeded by attachment and summons against the defendant, to collect a note. He obtained a judgment before the justice, which was reversed by the county court of Chemung. No reason is assigned by the judge

for reversal; but it is presumable it was for some of the reasons contained in the respondent's points. It is said that the attachment being succeeded by a summons, indicates that the party proceeded under the provisions of the non-imprisonment law and not under those of the revised statutes; and that the affidavit does not state facts sufficient to warrant the issuing of an attachment.

The 34th section of the non-imprisonment act (*Laws of 1831 p. 396*), allows an attachment to issue, when it shall "satisfactorily appear to the justice that the defendant is about to remove from the county any of his property with the intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of, or secrete any of his property with the like intent, whether the defendant be a resident of this state or not." The affidavit specifies several causes for issuing the attachment; amongst which is the cause, that the defendant is about to dispose of his property with intent to defraud his creditors. The affidavit then assigns the existence of the following facts as evidence of that intent: that the defendant left the county of Chemung two months before, and went to the province of Upper Canada with intent to remain there, and had taken with him some portion of his personal property; that he had no family, and but little property; that he was offering his property in Chemung county for sale; and that he told the plaintiff that he would be damned glad if he ever got his pay of him; that no civil process could be served on him because he kept out of the State; and he refused to pay anything on the plaintiff's debt.

To my mind, the above facts prove a strong case of *intent* to dispose of property to defraud creditors. At all events, there was some evidence for the justice to act on, and the proceedings ought not to be reversed for insufficiency of proof in this respect. If the defendant was a non-resident of the State, and did the acts specified in section 34, he could be proceeded against by a long attachment. But in this case, it is quite certain the defendant had not yet gained a residence, out of the county of Chemung.

But it is said the return of the officer to the attachment was not sufficient, because it did not state specifically whether the copy of the attachment was, or was not, personally served on the defendant, as required by section 36. The return is, "By virtue of this attachment, I seized the goods and chattels mentioned in the

annexed inventory, *and the defendant not being found in the county*, on the same day I left a copy of the attachment and inventory duly certified by me with Wm. E. Baker, in whose possession the goods were found, the said defendant having no place of residence in the county of Chemung. July 26, 1852."

The 36th section requires a *personal* service on the defendant, *if he can be found in the county*, instead of leaving the copy at his last place of residence. Now the return says, "the defendant cannot be found in the county, and he has no place of residence in the county, and I left the copy with the person in whose possession the goods attached were found." The officer asserts the fact that the defendant cannot be found in the county, and the law would adjudge a service out of the county to be void. The result is, that a personal service, in this case, was an utter impossibility. It is as legally certain that the process was not personally served, as if the return had said so *specifically*. It seems to me the legislature did not attach any technical charm to the word *specifically*. Their object was, to enable the justice to learn from the return itself, whether or no the attachment and inventory had been personally served, so as to govern the future proceedings in the cause, and the effect to be given to the judgment. If it was a case of personal service, then no summons need be issued, and the judgment would be conclusive in all future proceedings. (§§ 37, 39.) But if served by copy, then a summons must issue; and if that was not personally served, then the judgment would be presumptive evidence, only, of an indebtedness, and might be repelled. (§§ 38, 39.)

The return in this case is sufficiently clear, that no personal service had been made. The justice so treated it, and issued a summons as required by § 38, which was regularly returned. The defendant is in no danger of being concluded by this judgment, in any future litigation as to its effect. It seems to me, therefore, that all his rights are protected; and that no legal rule of construction, or just administration of the law, calls for a reversal of the proceedings, for the sole reason that the constable omitted to say in his return, "I did not serve the copy personally," when he at the same time tells us so, by showing it impossible that he could have done it.

That the affidavit contains facts which would have warranted an

attachment, under the revised statutes, is not a ground of error, provided the process actually issued is warranted by the affidavit.

We have come to the conclusion that there is no error in the justice's judgment, and that it should have been affirmed. The judgment of the county court is reversed and that of the justice affirmed with costs.

COURT OF COMMON PLEAS.

RUFUS MORANGE v. CHARLES EDWARDS.

(1 *E. D. Smith*, 414. *Decided* 1852.)

THIS was an action commenced in the New York marine court, for wages due as a sailor, against John Doe, master of the English Ship "Vivid." The defendant in this action, obtained the discharge of the attachment by executing to the constable a bond conditioned that he should pay any judgment, with costs, charges, and legal expenses, which might be recovered *in the said action*.

A judgment was obtained by the plaintiff and execution issued and returned within five days—no goods or chattels and that the defendant could not be found. The bond was assigned by the constable to the plaintiff in writing, but not under seal. The plaintiff brought action on the bond so assigned, in the marine court, and recovered a judgment thereon. The defendant appealed to this court.

On the trial in the marine court the defendant insisted that the original judgment was erroneous because the court had included therein fees paid by the constable for the care of the vessel while held by him under the attachment — that the constable could not act by deputy.

Charles Edwards, appellant in person.

Alanson Nash, attorney for the respondent.

By the Court, INGRAHAM, First J. Whether the bond in the case was taken under an attachment issued in lieu of the warrant

as formerly allowed against non-residents (2 *R. L.* p. 381, § 118), or under the provisions of the 32d section of 2 *R. S.* p. 231, as made applicable by the act to abolish imprisonment, we think it was properly taken in the name of the constable, and that it may be assigned by him to the party for whose benefit the bond was taken. There is nothing in the statute preventing the assignment, and the authority to assign belongs to the general powers and duties which the officer is called upon to exercise and discharge.

It is not necessary that an execution should remain in the hands of the officer sixty days. The return cannot be sooner compelled, but the officer may, of course, at his own risk, return it sooner, if he is prepared to say there is no property. An assignment of a bond is good, though not under seal. Sheriffs' bonds were always so assigned.

Proof that the attachment was lost was sufficient to dispense with its production, if such production was necessary.

It is too late to object to the amount of the recovery on the original judgment. The remedy was on the appeal upon the original judgment, and not on the trial upon the bond.

The foregoing disposes of all the questions which arise upon this appeal, excepting one respecting the validity of the bond. The condition of this bond is *not* to provide for the appearance of the defendant, or for the forthcoming of the goods to answer the execution, but to provide for the payment of the amount of the judgment rendered in the original action. We can find no authority for taking such a bond. The goods may not have been equal in value to the amount recovered, and yet the obligors under this bond would be held liable to pay the whole judgment without reference to the goods surrendered.

Nor can it be said that this was a voluntary bond. It was taken *colore officii*, and the debtor was compelled to give it or have his property taken from him. We have been referred to no provision of any statute authorizing such a bond, and unless so provided for, the objection made to it by the defendant must be sustained.

Judgment reversed.

COURT OF APPEALS.

GARDNER v. CLARK.

(21 *New-York Rep.*, 399. *Decided* 1860.)*Francis Kernan*, for the appellant.*Samuel Beardsley*, for the respondent.

Selden, J. It is quite certain that the judge at the circuit erred in supposing that, by including a defence upon the merits in the same answer with the defence of a former suit pending for the same cause of action, the defendant had waived the latter defence. A doubt at one time existed, whether the Code had abrogated the rule of the common law which required matters in abatement to be first pleaded and disposed of before pleading in bar to the action; and there were, in the Supreme Court, conflicting decisions on the subject. The question, however, came before this court in the case of *Sweet v. Tuttle* (4 *Kern.*, 465), where it was held that the court provided but for a single answer, in which the defendant is required to include every defence upon which he relies to defeat the action. This decision must be considered as settling the question. The only serious inconvenience suggested as likely to result from this construction of the Code is, that when an answer embraces both a defence in abatement and in bar, if the jury find a general verdict, it will be impossible to determine whether the judgment rendered upon the verdict should operate as a bar to another suit for the same cause of action or not. It would, however, be the duty of the judge at the circuit, in such a case, to distinguish between the several defences in submitting the cause to the jury, and require them to find separately upon them. In that way, it is probable that the confusion which might otherwise result may, in most cases be avoided. At all events, the Code admits, I think, of no other construction.

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COURT OF APPEALS.

HAGGART v. MORGAN.

(5 *New-York Rep.*, 422. *Decided* 1851.)*J. H. Patten*, for the appellants.*Albert Mathews*, for the respondents.

<i>Gardiner, J.</i>	*	*	*	*	*	*
*	*	*	*	*	*	*

The defendants at the trial offered to prove "that at the time of taking out the attachment mentioned in the pleadings, and at the time of the giving of the bond in suit, the debtor, Brandegee, was not a non-resident of the city of New York, but a resident. That he had been absent about three years, in attending a lawsuit at New Orleans, and returned in the spring of 1848." The judge excluded the evidence on the grounds:—1st, That the offer itself showed the debtor to be a non-resident, at the time when the attachment issued, within the spirit of the act;—2d, That the giving of the bond to discharge the attachment, prevented him from showing such fact; and the defendant excepted. This exception presents the only question in the cause, worthy of serious consideration.

The ruling of the judge was probably correct for the reasons assigned by him. *In the matter of Thompson* (1 *Wend.*, 45), the distinction was taken between the *residence* of the debtor, and his *domicil*. It was there held that his residence might be abroad, within the spirit of the statute, which was intended to give a remedy to creditors whose debtors could not be served with process, while his domicil continued in this State. In *Frost v. Brisbin* (19 *Wend.*, 14), it was said, in a case like the present, that actual residence, without regard to the domicil of the defendant, was within the contemplation of the statute. It was part of the offer of the defendants, to prove, that the debtor left this State in November, 1844, and returned in the spring of 1848, and that this absence of three years and a half was necessary to accomplish the business in which he was engaged. He was therefore a *non-resident* when the

attachment was issued, within these decisions, although *domiciled* in New York.

Again, the defendant was concluded by his bond from alleging his residence in this State in this action. The fact of residence must from its nature be peculiarly within the knowledge of the debtor. He *knows* what the creditor can only infer from circumstances. The fact itself is not jurisdictional, although competent proof of that fact is. (2 *R. S.* §§ 4 and 5.) This makes the distinction between this case and the one in 6 *Cowen*, 136, and the authorities there cited. Here, the preliminary proceedings were regular, as the defendants themselves assume. The officer therefore acquired jurisdiction to issue the warrant, and the property of the debtor was rightfully in the custody of the law, when the bond was executed as a means of discharging the attachment, under the 55th and 56th sections of the statute. In *Kanouse v. Dormedy* (3 *Denio*, 569), the question was as to the residence of the creditor, and it was held, in a case like the present, that the bond was *prima facie* evidence of the regularity of the proceedings. (See 26 *Wend.*, 510; *Staples v. Fairchild*, 3 *Comst.* 41.)

Again, by §§ 44-5 and 46, of the statute, a mode is provided, in which this question of non-residence can be summarily tried, upon the application of the debtor, and the execution of a bond for costs. If the determination is in favor of the debtor, all the proceedings under the attachment are terminated (§ 48). He has therefore two remedies for the release of his property. One by contesting the fact of his non-residence when the warrant issued; the other by giving a bond to pay such judgment as shall be subsequently recovered by the creditor in due course of law. When he elects the latter remedy, he ought not to raise the issue which he has voluntarily declined in a defence to a suit brought for an entirely different purpose, and thereby deprive the creditor of his security for costs, to which he would have been entitled, had the application for a trial been made as provided by the statute.

SUPERIOR COURT.

KING v. DOWDALL.

(2 *Sand.*, 131. *Decided* 1848.)

* * * * *

Where Sunday is an intervening day, it is counted in computing statute time.

Certiorari to one of the assistant justice's courts. The facts are sufficiently stated in the opinion.

T. E. Tomlinson, for the plaintiff in error.

G. A. Curtis, for the defendant in error.

By the Court, OAKLEY, Ch. J. Dowdall sued King in the court below by a summons dated January 12th, and returnable January 17th, 1848. Dowdall was a non-resident, and the 16th day of January was Sunday. The defendant at the return of the summons, appeared and moved that it be quashed and the suit dismissed, on the ground that it was returnable in five days.

The justice overruled the motion. The parties then joined issue, proceeded to trial, and the plaintiff recovered a judgment. The defendant seeks to reverse the judgment, both on the merits, and on the preliminary objection to the process.

We will first consider this objection. The law on the subject undoubtedly is that a non-resident plaintiff may take out a short summons, having not less than two nor more than four days to run, or a long summons, having not less than six nor more than twelve days between its date and return. He has the option to take the one or the other, on giving the prescribed security, if he take the former. The difficulty here is that the summons was neither long nor short. It is a summons of five days, if Sunday is to be counted as one.

The question then is whether Sunday is to be counted in the computation of time on this process.

We know of no rule or principle by which it is to be excluded from the computation where it is an intermediate day, and we supposed the law on the subject was settled. The defendant in error

has brought to our notice the cases in the Massachusetts Reports, cited in Mr. Hill's note to 2 Hill, 376. It suffices to say, that the rule indicated by those cases, is not the rule in this State, and whether those decisions were well founded or not, we cannot follow them. (*Ex parte Dodge*, 7 Cowen, 147; *Columbia Turnpike Road v. Haywood*, 10 Wend., 422; *Anonymous*, 2 Hill 375, and note b., page 376.)

The law is established here that Sunday must be computed when it is an intermediate day, and the objection to the process is fatal. The court below was wrong in disregarding it, and the proceeding was without legitimate authority.

We have a discretion as to costs; and as the error here was purely the act of the magistrate in the issuing of the summons, the judgment will be reversed without costs.

Judgment reversed.

IN CHANCERY.

POTTER v. BAKER AND OTHERS.

(4 Paige, 290. Decided 1834.)

* * * * *

The appellate court, under the provisions of the revised statutes, with the assent of the obligors, may amend the appeal bond in matters of substance; as by adding the names of other sureties, where, by mistake or through inadvertence, the requisite number of sureties have not joined in the bond.

THIS was a motion to dismiss an appeal from a final decree of the vice chancellor of the eighth district. The original suit was a bill of interpleader to settle the conflicting claims of three classes of defendants to a sum of money received by the complainant from the United States on account of the destruction of a school house.

* * * * *
* * * * *

The vice chancellor having decreed the whole fund in controversy to the trustees of district No. 1, the original proprietors of the school house appealed to the chancellor. After this appeal had been duly entered and per-

fect, the trustees of district No. 2 appealed from so much of the decree as adjudged that district No. 1 was entitled to the whole fund, and that district No. 2 was not entitled to any part thereof. The respondents applied to dismiss the last appeal, on the ground that notice of the appeal had not been served on the solicitor of the original proprietors of the school house, the appellants in the first appeal; and also on the ground that the appeal bond was defective in the manner of its approval, and in not containing the requisite number of sureties.

A. Tabor, for the appellants.

J. Edwards, for the respondents.

The CHANCELLOR * * * * *

The appeal bond, however, was defective, as there was but one surety. (*Van Wezel v. Van Wezel*, 3 *Paige's Rep.* 38.) And the motion to dismiss the appeal must be granted, unless the court has power to relieve the appellants by an amendment of the bond or otherwise. The proceedings upon appeals from the vice chancellors, except as to the time within which the appeal must be entered by filing and serving the requisite notices, are regulated by a rule of the court, and not by statute. I am therefore inclined to think that this court has the power to relieve the appellant independently of any statutory provision. (*See Rule 126, and 1 Paige's Rep.* 391.) It is not necessary, however, to decide that question here; as I am satisfied this case comes within the 34th section of the title of the revised statutes which contains the general miscellaneous provisions concerning suits and proceedings in civil cases. (2 *R. S.* 556, § 34.) The counsel for the respondents supposes that the amendments authorized by that section of the statute, can only be amendments of mere formal defects; such as are described in the next preceding section. But the legislature never contemplated an actual amendment of a mere formal defect in the bond. Such defects are cured by the 33d section, without the necessity of an application to the court. The legislature having thus disposed of this class of cases, they intended, in the language of the revisors in their note to the 24th section, to carry out the principle, by pro-

viding for an actual amendment of the bond, in matters of substance, where an error had occurred through inadvertence, or from a misapprehension of the law. In the present case there was no intention to delay the proceedings of the adverse party, by putting in an insufficient or defective bond. The appellant's solicitor had also some reason to suppose his practice was regular, as an officer of the court, whose duty it was to see that the bond was correct, approved of the same. The statute having authorized the court to amend the bond where it is defective in any respect, this is a very proper case to grant such relief. The appeal bond may therefore be amended, by adding another surety thereto, with the written consent of the present obligors; which consent must be annexed to, and filed with, the bond.

* * * * *

SUPREME COURT.

SLOAN AND OTHERS v. CASE.

(10 *Wend.*, 370. *Decided* 1833.)

Debt lies against a constable and his sureties for the mere neglect to return an execution; it is not necessary to show *moneys* collected by him, to sustain the action.

* * * * *

ERROR from the Sullivan common pleas.

W. J. Street for the plaintiffs in error, insisted, 1, *That* the mere neglect to return an execution is not a breach of the obligation entered into by a constable and his sureties, *unless moneys have come into his hands* on account of the process which he neglected to return; * * * * *

* * * * *

A. Dimmick & A. C. Nivin, for defendant in error.

By the Court, NELSON J. In *Kellogg v. Wilder*, decided in July term 1831 (not reported), the first question raised in this case was

decided, and it was there held that for a *mere neglect to return an execution*, a suit lay against a constable and his sureties. In *Warner v. Racey*, 20 *Johns. R.* 74, a justice's judgment, rendered against a constable, was reversed because there was no evidence *that money had come to his hands*; but there the condition of the bond was for the payment of all sums of money which should come into Warner's hands for collection by way of execution, and not in the terms of the statute, to pay to each and every person such sum of money as the constable *should become liable to pay* for or on account of any execution, etc. In *Gardner v. Jones*, 20 *Johns. R.* 357, the liability of the constable for the mere neglect to return is fully recognized. Every person chosen or appointed to the office of constable is required, before entering on the duties of his office, to enter into an *instrument in writing*, with one or more sureties, by which he and they shall jointly and severally agree to pay to each and every person who may be entitled thereto, all such sums of money as the constable *may become liable to pay*, on account of any execution which shall be delivered to him for collection, 1 *R. S.* 346, § 21, being an enactment of the act of 1813, 2 *R. L.* 126. It is clear that the responsibility of the sureties is co-extensive with that of the constable, and that they are liable whenever he is liable to a party in whose favor an execution has been delivered to him. It would be doing violence to the language and obvious intent of the act, and greatly abridge the rights of parties, to confine such responsibility to cases only in which moneys had been collected and remained in the hands of the officer. The provision in the revised statutes 2 *R. S.* 253, § 159, in terms more express than the act of 1824, subjects the constable to an action of debt for *neglecting to return* an execution, and authorizes a recovery against him for the amount of the execution, with interest. The following cases show the general understanding of the profession and of the court as to the liability of constables and their sureties; 13 *Johns. R.* 191; 14 *id.* 225; 3 *Wend.*, 282; 2 *id.* 615. The provision in the revised statutes, 2 *R. S.* 254, § 163, giving the action of *assumpsit* against the constable and his sureties for *moneys collected* upon an execution, in no way affects the general responsibility of constables and their sureties under the act, 1 *R. S.* 346, § 21. Assumpsit in the particular case of moneys collected was probably given from abundant caution, though I cannot preceive its impor-

tance; at all events, I cannot construe it as *limiting* the responsibility of sureties to cases where moneys have been actually collected.

* * * * *

SUPREME COURT.

THE PEOPLE ex rel. THE BANK OF MONROE v. DARIUS PERRIN,
LATE SHERIFF OF MONROE COUNTY.

(1 *How.*, 75. *Decided* 1845.)

Where real estate has been sold upon judgment and execution, the statute allows an affidavit of redemption to be made by the "mortgage creditor, his assignee or representative, or by his attorney or agent." *Held*, that when the affidavit merely recited that the deponent was agent instead of making *oath* to the fact of such agency, it was defective; it was merely *descriptio personæ*. The fact of agency should have been stated in the body of the affidavit and sworn to.

Beardsley, Justice.

THE substance of the opinion of the Court on the point of the sufficiency of the affidavit presented, is stated in the syllabus.

IN CHANCERY.

WINSOR v. ORCUTT, WOOD AND BAXTER.

THE SAME v. ORCUTT, WOOD AND WESTOVER.

(11 *Paige*, 578. *Decided* 1845.)

Where the condition of an attachment bond was that the plaintiff pay the damages which the defendant may sustain by reason of the attachment *held*: to show a right of action upon such bond the complainant must allege that he has sustained damage by reason of the attachment and the manner in which such damage arose, and if costs were awarded to him, that such costs have not been paid; so as to constitute a breach of the condition of the bond.

A. J. Parker, for the appellant.

H. Van Derlyn, for the respondents.

The CHANCELLOR. The vice chancellor was unquestionably right in supposing that these were suits concerning property, within the provision of the revised statutes in relation to the jurisdiction of this court. The object of each suit was to set aside a release, given by one of the nominal plaintiffs, in an action at law upon a bond. The rights of action, if any existed, upon the bonds in question in the suits at law, were choses in action, and were property. And the suits in this court, to set aside the releases of such choses in action, were suits concerning property; as contradistinguished from suits for divorces or other mere personal rights.

The bills do not show what amount the complainant claimed to be due for damages upon the attachment bonds, or that he had in fact sustained any damage by reason of the attachments, or that costs were awarded upon the quashing of the proceedings before the justice, or that any property belonging to the complainant had been attached so as to give him any right of action whatever upon the bonds. The bills merely state that suits by attachment, were commenced, and bonds were given, and that the constable levied on certain property as the individual property of Winsor; not that the property levied upon was in fact his property, or was in his possession. And the complainant then states the commencement of the suits in the supreme court by declaration for the purpose of collecting the amount of damage which Winsor had sustained by reason of the commencement of the attachment suits, and the proceedings thereon; but without stating what such damages were, or how they had arisen, or whether the declarations in the supreme court showed any right of action whatever. The complainant, therefore, appears to have proceeded upon the supposition that the defendant in an attachment suit is entitled, of course, to recover some damages upon the bond, if the plaintiff fails to recover judgment against him. The condition of the bond, however, is not that the plaintiff shall succeed in obtaining judgment, so as to entitle the defendant to nominal damages, at least, in case the plaintiff fails in the suit, although he pays the costs, if any, which are awarded against him, but the condition of the attachment bond is only to pay the damages which the defendant may sustain by reason of the attachment. To show a right of action upon the bond, therefore, the complainant must aver that he has sustained damages by reason of the attachment, and must state the manner

in which such damage has arisen. Or if costs were incurred, or were awarded to him, he must aver that such costs have not been paid; so as to constitute a breach of the condition of the bond.

The bills in both cases were fatally defective in these respects, as they do not show any right of action on either of the bonds, or that the conditions of the bonds had not been fully complied with when the actions in the supreme court were commenced upon such bonds. The complainant, therefore, was not entitled to decrees in his favor upon these bills, even if the defendants failed to support the affirmative allegation, in their answer in these suits respectively, that the amount in controversy was less than \$100.

I am inclined to think, however, that the proofs showed that the amount in controversy could not exceed \$100 in each suit, if any recovery whatever could be had upon the bonds, on the facts proved. It appears, by the proofs, that the property attached did not belong to the complainant, and that it was not taken out of his possession. Mere formal levies upon the property were made, by the constable; and the real owners of such property were present and claimed it, and gave bonds therefor to the constable, who suffered it to remain undisturbed. Winsor appeared, upon the return of the attachments, and pleaded in abatement that the property attached was not his; and succeeded in getting the attachments dismissed upon that ground. And the plaintiff in the attachment suits thereupon paid the whole of the complainant's costs in both suits. Even if nominal damages therefore could have been recovered upon the bonds, which were in the penalties of \$200, so as to entitle the plaintiff to costs in the actions at law, according to the fee bill of 1840, the costs of both parties in the action, upon a mere joining of the issue, could not, at the extent, have exceeded sixty or seventy dollars. And the amount of damages to which the complainant was entitled upon the bond, and the costs of both parties in the action on the bond, was all that constituted the amount in controversy. In any view of the cases, therefore, the vice chancellor was bound to dismiss the bills; and I think he was right in dismissing them with costs.

The decrees appealed from must, therefore, be affirmed, with costs.

SUPREME COURT.

WILSON AND OTHERS v. BRITTON.

(26 Barb., 562. Decided 1858.)

Where it was shown by affidavit that the attachment defendant in a conversation with the plaintiffs had declared that he would not pay the demand of the plaintiffs but would compromise with his creditors at $33\frac{1}{3}$ per cent on the dollar, and if plaintiffs would not take that, "he would go home and make an assignment of his property, and that the plaintiffs would not get any thing of their claims. He would put his property out of his hands," held that this was no threat to make a fraudulent disposition of his property.

The court will not presume an evil intent when the words employed admit of a different construction, and when no contemporaneous or subsequent acts are shown to give any other signification to them.

THIS was an appeal from an order made at a special term, denying a motion to vacate an attachment.

John Foot, for the appellant.

Jas. T. Brady, for the plaintiffs.

By the Court, CLARKE, J. I do not find, even in the affidavit presented on behalf of the plaintiffs, any thing to convince me that the defendant, in his conversation with the plaintiffs, on the occasion referred to in the plaintiffs' first affidavit, intimated any thing more than that he intended to make an assignment. If his declaration admits of this construction, merely, why should we infer that he intended fraud? This would be contrary to the benign principle that we are not to presume wrong until wrong is plainly indicated. Of course we are not obliged to confine our interpretation to mere words; but if we seek for his intent from any other source, it must be to give effect to his words. In this case the defendant's conduct by no means, corresponds with the construction, given to his conversation, referred to in the plaintiffs' affidavit. He attempted no fraudulent disposition of his property; but, subsequently, made a legal and valid assignment of his property for the benefit of his creditors. Does his language, set forth in the plaintiffs' affidavit, even supposing it to be reported correctly, fairly import any thing more than this? "He would go home and make an assignment of his property, and that the

plaintiffs would not get any thing of their claims. He would put his property out of his hands." He stated how this was to be done—by making an assignment. This was no threat to make a fraudulent disposition of his property, on the contrary, it was a perfectly legal disposition of it—a disposition of it, also, entirely consistent with the fact that the result would be that the plaintiffs would not get any thing of their claims. For he may give preferences, which the law also allows; and by providing full payment to some creditors, nothing may be left out of the assets for others. We cannot, therefore, I think, sustain this attachment without presuming an evil intent, when the words employed admit of a different construction, and when no contemporaneous or subsequent acts are shown to give any other signification to them. The defendant, probably, meant by an emphatic representation of the course which he intended to pursue, to induce the plaintiffs and his other creditors, to compromise their claims, and to save him the necessity of making an assignment. But however strenuously he might have urged this upon their attention, it amounted to nothing more than that he was determined, if they did not compromise, to make an assignment. This was the whole substance of it; and we cannot pronounce this to be a threat to make a fraudulent disposition of his property, unless we are prepared to stigmatize that as fraudulent which the law expressly sanctions. Having arrived at this conclusion, it is unnecessary to consider the legal question submitted by the defendant's counsel.

The order appealed from should be reversed, with costs.

SUPREME COURT.

ROSEKRANS v. VAN ANTWERP.

(4 *John.*, 228. *Decided* 1809.)

A justice cannot permit a party to appear by attorney, from his own knowledge of the fact that the party is absent at the time and out of the county; he must have *proof* of the fact.

Per Curiam. One principal objection to the proceedings in the case below is, that the justice admitted the plaintiff to appear by attorney, upon his own knowledge of the fact of his absence

from the county ; and at the different days to which the cause was adjourned, the same attorney appeared, as the plaintiff had not returned to the county. The statute on this subject (31 *sess. c.* 204) declares that it shall not be lawful for the justice to permit any person to appear and advocate in his court for any party, unless such party be prevented from attending, by reason of sickness or absence from the county, of which proof is to be made. The question is, whether the justice acted upon the requisite proof of the absence of the plaintiff below. He returns that the plaintiff was absent from the county, "to his certain knowledge." As this provision in the statute is a pretty rigorous restraint of the common law right of every party to appear by attorney, and may operate, in many cases, most severely upon a party who is wholly unskilled in conducting a cause or even in stating a case, we could wish that the *proviso* admitted of greater latitude of interpretation : but as the statute is explicit, that *proof* of the absence of the party must be made, before the attorney is to be admitted, the justice cannot act from his own knowledge, and call that knowledge proof. Such a principle would be dangerous, and is contrary to the decision of this court in the case of *Burlingham v. Deyer* (2 *Johns. Rep.* 189). The proceedings on the part of the plaintiff below were, therefore, without authority, and contrary to law ; and for this reason the judgment below must be reversed.

SUPREME COURT.

PRESCOTT v. ROBERTS, IMPLEADED WITH HIBBARD.

(6 *Cowen*, 45. *Decided* 1826.)

One affidavit of merits to prevent an inquest is sufficient, though the cause be several times noticed for trial and inquest.

And if filed and served on the plaintiff's attorney, for a circuit in one county, it is sufficient, though the venue be afterward changed to another county, and the cause be tried in the latter.

THE venue in this cause was at first laid in the county of Onondaga ; and was noticed for trial and inquest there, at the last March circuit. To prevent an inquest, and put the plaintiff to the regular

course of the calendar, the defendant filed with the circuit clerk the usual affidavit of merits; and served a copy on the plaintiff's attorney. The cause not being then tried, the venue was changed to the county of Rensselaer, by stipulation between the parties. The plaintiff then noticed the trial for cause and inquest, at the previous June circuit in Rensselaer, when an inquest was taken against the defendant in the cause out of its order on the calendar; no new affidavit of merits being filed and served by the defendant in order to prevent this.

A motion was now made on the part of the defendant to set aside that inquest, and all subsequent proceedings, for irregularity; and 6 *John. Rep.* 19, 2 *Dunl. Pract.* 686, and 4 *Cowen*, 539, 540, were cited in support of the motion.

J. Watson, for the motion.

J. Fleming, jun., contra.

Curia. We held (4 *Cowen*, 540), that a single affidavit of merits extends throughout the whole progress of the cause; that there is no need of one at every circuit at which the cause may be noticed. This was, however, of a cause where there had been no change of venue. The affidavit filed at Onondaga was not notice to the circuit judge at Rensselaer; but it was notice to the attorney for the plaintiff. This was enough. A change of venue does not vary the principle. The motion must be granted. But as the precise point has not before been decided, we grant the motion without costs.

Motion granted.

SUPREME COURT.

KEELER v. CLARK.

(18 *Abbott*, 154. *Decided* 1864.)

THIS was a motion by the plaintiff to set aside an execution in the hands of the sheriff of Broome county, by virtue of which he had been arrested and was held in custody.

Keeler brought an action in a justice's court against Clark. The complaint was: "The plaintiff complains against the said defendant as follows: that in or about the year 1857, the defendant had in his possession and use a yoke of oxen belonging to and owned by plaintiff; and that while using and working said oxen, defendant carelessly and negligently rolled a stump upon said oxen and broke the leg of one of them, and afterward killed, the same, by reason whereof plaintiff sustained damage to the amount of one hundred dollars; therefore plaintiff demands judgment against the defendant for one hundred dollars and the costs of this action."

The answer was a general denial. The cause was tried by the justice and judgment rendered for the plaintiff. Defendant appealed to the county court where judgment was affirmed. An appeal was then taken to the Supreme Court, where the previous judgments were reversed, and judgment rendered against the plaintiff for costs. Execution was issued against the property of the plaintiff, and returned unsatisfied, whereupon an execution was issued against his body, and he was arrested. The plaintiff now moves to set aside this execution.

Lewis Seymour, for motion.

T. D. Wright & B. S. Curran, opposed.

BALCOM, J. The manner in which actions are to be commenced before justices of the peace, except those to recover the possession of personal property, is not prescribed by the Code. (*See Code*, §§ 52-68.)

Actions in justices' courts, except those above mentioned, are

now commenced, as heretofore, by the voluntary appearance and agreement of the parties, or by summons, warrant, or attachment, as provided by the Revised Statutes, the act of 1831 to abolish imprisonment for debt, and the statutes amending the same. (*See 3 Rev. Stat.*, 5 ed., 428-433; *Ib.*, 462-465; *Laws of 1831*, 396, ch. 300; 1 *Cow. Treatise*, 2 ed., 451-493.)

Title seven of the second part of the Code concerning provisional remedies in civil actions does not relate to actions in courts held by justices of the peace. (*Code*, § 8.) A defendant cannot be arrested under that title, or under any other provision of the Code, in an action commenced before a justice of the peace. He can only be arrested in such an action when it is commenced by warrant issued by the justice in the manner prescribed by statute irrespective of the Code.

But parties to actions brought before justices of the peace, though commenced by summons, for torts or wrongs, and for some other causes of action, are liable to arrest and imprisonment by virtue of executions issued on judgments rendered in such actions. (*See Statutes cited supra*; 2 *Cow. Treatise*, 2 ed., 1034-1047; *Laws of 1840*, 120; 9 *Wend.*, 430; 13 *Ib.*, 68.)

The plaintiff's counsel contends that the complaint shows that this action was founded on contract, that it was not purely *ex delicto*; and he therefore insists that the plaintiff's imprisonment by virtue of any execution issued on the judgment in it, is forbidden by the first section of the act to abolish imprisonment for debt. (*Laws of 1831*, 396, ch. 300.) He relies principally upon the decisions in *Masters v. Stratton* (7 *Hill*, 101,) and *Wilbur v. Brown* (3 *Den.*, 356) to sustain his position. But those decisions do not aid him. Those actions were for *non-feasance*, mere omissions of duty imposed by contracts; and they could not be sustained without proving such contracts; and of course were founded on contracts, and were brought for the recovery of damages for the non-performance thereof by the defendants.

This action was brought for *mis-feasance* or *mal-feasance*, for negligently doing positive acts, and was maintainable, if at all, for *tort* simply, without reference to any contract made between the parties. The plaintiff could have recovered a valid judgment if the proof of negligence on the part of the defendant had been sufficient, without showing that the defendant was using the oxen

pursuant to a contract at the time they were injured. He was not bound to prove, to sustain his complaint, that he gave the defendant permission to use the oxen. His case would have been established if he had showed himself free from negligence, and that the oxen were injured by the negligent acts of the defendant. It would therefore be erroneous to hold that the action was founded on contract, or that it was brought for the recovery of damages for the non-performance of a contract.

But if the plaintiff had been obliged to prove, to sustain the complaint, that the defendant used the oxen by virtue of an agreement between the parties, still the action would have been *ex delicto*, — *i. e.*, for positive wrong on the part of the defendant in carelessly and negligently rolling a stump upon them, and breaking the leg of one of them.

The Court for the Correction of Errors held in *McDuffie v. Beddoe*, (7 *Hill*, 578), that an action may be *ex delicto*, or for tort, though a contract be alleged by way of inducement; and I held the same way without having my attention called to that case, in *Ridder v. Whitlock* (12 *How. Pr.*, 208.)

It seems to me to be very clear that this action was one for injuring the plaintiff's oxen, and not one for a breach of contract for their use; and that if the action had been commenced in this court, the defendant could have been arrested, and held to bail under section 179 of the Code, and also imprisoned by virtue of an execution against his person, issued upon a judgment against him in the action, by virtue of section 288 of the Code.

The complaint contains a statement of facts, showing one of the causes of arrest (to wit, an injury to the plaintiff's oxen by the negligent acts of the defendant) required by the above mentioned section 179 of the Code; and the judgment of this court in the action must be enforced by execution according to the Code. (§ 283.)

The defendant could have been imprisoned by execution, issued on the judgment of the justice, if he had not appealed therefrom; and the plaintiff could have been imprisoned by execution, issued by the justice, if the justice had rendered judgment against him instead of in his favor, and no appeal had been taken therefrom.

I am of opinion that the remedies by execution for enforcing the judgment rendered by this court in the action, are the same they

would be if the action had been commenced in this court ; and that the execution against the person of the plaintiff, on the judgment rendered against him by this court for costs was regularly issued ; and that the motion to set it aside should be denied, with \$10 costs, Order accordingly.

SUPREME COURT.

HAGGERTY AND NOBLES v. WILBER AND BARNET.

TROTTER AND DOUGLASS v. HENRY.

(16 *John.*, 286. *Decided* 1819.)

A sheriff, in order to levy an execution or to arrest, may break open a store, warehouse, or barn, not annexed to a dwelling-house, or forming any part of the *curtilage*, as well as the inner doors of a dwelling-house, trunks, &c.

The goods of the defendant are bound from the time of the delivery of the execution to the sheriff; and any assignment of them by the defendant, afterward is void.

The sheriff, before the return day of the execution, must make an actual levy on the goods, by taking an inventory of them. Though an inventory may not be requisite in all cases; yet, to make a good and valid levy, the sheriff must have the goods within his view, and under his power. Merely seizing a few articles outside of a store or warehouse, and proclaiming a levy on the goods locked up in the store, and not within view, is not a levy; but the sheriff ought to break open the store and actually seize the goods, and take an inventory of them.

THE sheriff of Otsego made a special return to ten different writs of *fieri facias* directed to him. Nine of the executions were against Wilber and Barnet, and the other against Henry ; and a question was raised on the return of them, as to the priority to which they were respectively entitled. In the first four suits, the executions were delivered to the sheriff between the 7th and 15th of January, 1817, inclusively, and the others in July, August, and November, 1817. The return stated, that the property out of which the money now in the hands of the sheriff was made, was, except a small quantity of household furniture, transferred by Barnet and Henry to Campbell and Hyslop ; that Wilber and Barnet had been partners, but Wilber had withdrawn from the partnership, and

assigned his interest in it to Henry, who was to pay his proportion of the partnership debts. Campbell and Hyslop took possession of the store containing the goods so assigned to them, and they locked up the store, with most of the goods in it, and kept the key; all which was done before the executions in the four first causes were delivered to the sheriff. The assignment to Campbell and Hyslop having been adjudged void by the court, the sheriff levied on the property by virtue of the four first executions, by going to the store and seizing some articles lying outside of it, and proclaiming that he levied on the store and the goods in it; but the store was not broken open, nor entered by the sheriff, nor was any inventory of the property taken. Wilber and Barnet held the store under a lease for years, which was unexpired. The property so levied on was sold by the sheriff in November, 1817, as soon as the decision of the court as to the validity of the transfer to Campbell and Hyslop was known, and the sale was made under all the executions.

The question was submitted to the court, on the returns, without argument.

SPENCER, *Ch. J.*, delivered the opinion of the court. The first question is, whether there was such a levy under the four first executions, as to entitle the plaintiffs in those cases to be satisfied the amount out of the sales of the store and goods.

There can be no doubt that the sheriff had authority to break open the store, and seize the goods. The privilege which the law allows to a man's habitation, and which precludes the sheriff from entering, unless the outer door be open, either to arrest the party, or to take his goods on execution, does not extend to a store or barn, disconnected from the dwelling-house and forming no part of the *curtilage*. (1 *Sid.* 186. 1 *Keb.* 698. *S. C.*) In the present case the store was uninhabited. It does not even appear that the defendants had a dwelling-house; and the store itself being a chattel interest, the sheriff had a right, no person being in the actual occupation of it, whether there were goods in it or not, to open it for the purpose of sale; and he might have delivered possession of it to the purchaser.

The statute altered the common law so far, that a *fi. fa.* binds the goods from the time of the delivery to the sheriff, instead of

binding them from the time of the *teste* of the writ ; and now, if, after the writ is delivered, the defendant makes an assignment of them, the sheriff may take them in execution ; but the statute does not alter the sheriff's duty in executing the writ. He is bound, whilst it is in force, that is, before the return day, to make an actual levy on the goods, by taking an inventory of them. An inventory is, perhaps, not necessary in all cases : for it has been held, that a seizure of part of the goods in a house, by virtue of a *fiery facias*, in the name of the whole, is a good seizure of all. The inventory furnishes the means of ascertaining what goods were levied on. It may be safely laid down, that the sheriff must have the goods under his view, and within his power, to constitute a good levy. A proclamation of a levy of goods locked up, and not within the view of the sheriff, is no levy. The authority which the law allows a sheriff, to break open a store not annexed to, or part of a dwelling-house, a barn, a warehouse, and inner doors of a dwelling-house after he has obtained peaceable admission into the outer door, and trunks, shows that the power is given, in order that the writ may be well served by breaking open such things. The consequence is, that there was no levy under the first four executions ; and those which were executed afterward must take priority in the order of time in which they were delivered. In *Bliss v. Ball* (9 *Johns. Rep.* 132), the principles here laid down were substantially recognized and adopted.

Henry makes no objection to the levy of these executions on the property or interest which he purchased of Wilber ; and the court is not called upon to express any opinion how far forth the entire property could be sold. But it appears that he purchased Wilber's interest, subject to the payment of the debts of the firm ; and the goods were seized and sold to satisfy the creditors of Wilber and Barnet. Henry has, therefore, no ground to object to the sales. The store itself, however, stands on different grounds. The levy on this store was sufficient ; and the proceeds of the sale of the store must be applied upon the first four executions, in the order of their delivery.

COURT OF APPEALS.

THE PEOPLE, *ex rel.* KNAPP *et al.* v. REEDER, SHERIFF, *et al.*(25 *New York Rep.*, 302. *Decided* 1862.)

Where a sheriff seizes personal property by virtue of an execution and allows it to remain in the hands of a third person, taking a receipt for the same, the sheriff is liable to the plaintiff for the loss of the goods if the receptor prove insolvent and the property fails to be applied to the creditors' debt.

John K. Porter, for the appellants.

Alexander S. Johnson, for the respondents.

DENIO, Ch. J.	*	*	*	*	*	*	*	*
	*	*	*	*	*	*	*	*

But it may be said that if the creditors take the benefit of the estoppel, they must recognize the sheriff's act in intrusting the property to the receptor as their own act; and therefore his insolvency, by which the property has been lost to them, must be accounted their misfortune and not that of the sheriff. This is plausible, but I do not think it a sound position. Upon seizing property upon an execution, the sheriff may take it into his own possession, or he may intrust it to another, and receive an undertaking for its redelivery with or without surety as he may think discreet and safe. He must judge at his own peril, as to the responsibility of the parties to whom he may deliver it. If they prove insolvent, by which the property fails to be applied to the creditors' debt, it is the misfortune of the sheriff who consented to trust them, instead of keeping the goods in his own hands, or requiring better security. It is one of the hazards incident to his office, for which he is recompensed by the other advantages which it secures to him. Any other rule would leave the creditors at the mercy of the executive officer of the court, who would have no motive of interest to see that the property levied on was kept in safe hands.

These propositions are, therefore, established, which together make out the case of the relators; namely that, Anson West, the only person who has ever claimed this property against the execution creditors, is proved by his own acts and concessions, which

are absolutely conclusive against him, and also by the judgment which he suffered to be recovered against him, to have no title to it; and that the sheriff, notwithstanding, intrusted it to him, upon his own agreement to deliver it up when called for, which agreement he has neglected to perform, and thereby the creditors have been deprived of having its value applied to the satisfaction of their debt. It follows, as it seems to me, inevitably, that the sheriff hereby became liable for the debt.

In a case very similar to the present, decided by the Supreme Judicial Court of the State of Maine (*Penobscot Boom Co. v. Wilkins*, 27 *Maine*, 345), it was decided that the officer could not set up, as a defence to the action of the creditor, that the property did not belong to the judgment debtor. A receipt had been taken, as in the present case, which contained expressions admitting, in effect, that the property belonged to the judgment debtor. The officer had voluntarily given up the receipt to the receptor. But it was conceded by the court that the officer could have defended himself, by any evidence which would have exonerated the receptor if he had brought an action against him. I consider the principle decided to be identical with the one which we apply in this case.

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SUPREME COURT.

WARREN v. LYNCH.

(5 *Johns.*, 238. *Decided* 1810.)

* * * * *

A scrawl, with the pen, of L. S. at the end of the name is not a seal. A seal is an impression upon wax or wafer, or some other tenacious substance capable of being impressed.

* * * * *

THIS was an action of *assumpsit* brought by the plaintiff, as the first indorsee of a promissory note, against the defendant as maker. The note was as follows: "Petersburgh, (Virginia,) August 27, 1807. Four months after date, I promise to pay Hopkins Robert-

son, the sum of seven hundred and nineteen dollars, 12½ cents, witness my hand and seal. Payable in New York.

THOMAS LYNCH. (L. S.)"

The flourish, and initials L. S. at the end of the maker's name, constituted what was called his seal. The defendant pleaded *non assumpsit*, with notice of special matter to be given in evidence at the trial,

* * * * *

Baldwin, for the defendant.

T. L. Ogden, contra.

KENT, Ch. J., delivered the opinion of the court. The two questions made upon this case are, 1. What is the legal import of the instrument upon which the suit is brought? * * *

1. The note was given in Virginia, and by the laws of that State it was a sealed instrument or deed. But it was made payable in New York, and according to a well settled rule, it is to be tested and governed by the law of this State (4 *Johns. Rep.* 285). Independent, then, of the written agreement of the parties (and on the operation of which some doubt might possibly arise), this paper must be taken to be a promissory note, without seal, as contradistinguished from a specialty. We have never adopted the usage prevailing in Virginia and in some other States, of substituting a scrawl for a seal; and what was said by Mr. Justice Livingston, in the case of *Meredith v. Hinsdale* (2 *Caines*, 362), in favor of such a substitute, was his own opinion, and not that of the court. A seal according to Lord Coke (3 *Inst.* 169), is wax with an impression. *Sigillum est cera impressa, quia cera sine impressione non est sigillum.* A scrawl with a pen is not a seal, and deserves no notice. The law has not, indeed, declared of what precise materials the wax shall consist; and whether it be a wafer or any other paste or matter sufficiently tenacious to adhere and receive an impression, is perhaps not material. But the scrawl has no one property of a seal. *Multum abludit imago.* To adopt it as such would be at once to abolish the immemorial distinction between writings sealed

and writings not sealed. Forms will frequently, and especially when they are consecrated by time and usage, become substance. The calling a paper a deed will not make it one if it want the requisite formalities. "Notwithstanding," says Perkins (*Sect.* 129), "that words obligatory are written on parchment, or paper, and the obligor delivereth the same *as his deed*, yet, if it be not sealed, at the time of the delivery, it is but an *escrow*, though the name of the obligor be subscribed." I am aware that ingenious criticism may be indulged at the expense of this and of many of our legal usages; but we ought to require evidence of some positive and serious public inconvenience, before we, at one stroke, annihilate so well established and venerable a practice as the use of seals in the authentication of deeds. The object in requiring seals, as I humbly presume, was misapprehended both by President Pendleton, and by Mr. Justice Livingston. It was not, as they seem to suppose, because the seal helped to designate the party who affixed it to his name. *Ista ratio nullius pretii* (says Vinnius, in *Inst.* 2, 10, 5,) *nam et alieno annulo signare licet*. Seals were never introduced or tolerated in any code of law, because of any family impression, or image, or initials which they might contain. One person might always use another's seal, both in the English and Roman law. The policy of the rule consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed and frauds less likely to be practiced upon the unwary. President Pendleton in the case of *Jones and Temple v. Logwood* (1 *Wash. Rep.* 42), which was cited upon the argument, said that he did not know of any adjudged case that determines that a seal must necessarily be something impressed on wax; and he seemed to think that there was nothing but Lord Coke's opinion to govern the question. He certainly could not have examined this point with his usual diligence. The ancient authorities are explicit, that a seal does, in legal contemplation, mean an impression upon wax. "It is not requisite," according to Perkins (*sect.* 134), "that there be for every grantor who is named in the deed a several piece of wax, for one piece of wax may serve for all the grantors, if every one put his seal upon the same piece of wax." And Brooke (*tit. Faits*, 30. and 17), uses the same language. In *Lightfoot and Butler's* case, which was in the Exchequer, 29 *Eliz.* (2 *Leon*, 21), the

barons were equally explicit, as to the essence of a seal, though they did not all concur upon the point, as stated in Perkins. One of them said that twenty men may seal with one seal upon one piece of wax only, and that should serve for them all, if they all laid their hands upon the seal; but the other two barons held that though they might all seal a deed with one seal, yet it must be *upon several pieces of wax*. Indeed this point, that the seal was an impression upon wax, seems to be necessarily assumed and taken for granted in several other passages which might be cited from Perkins and Brooke, and also in Mr. Selden's *Notes to Fortescue (De Lund. p. 72.)*; and the nature of a seal is no more a matter of doubt in the old English law, than it is that a deed must be written upon paper or parchment, and not upon wood or stone. Nor has the common law ever been altered in Westminster Hall upon this subject; for in the late case of *Adam v. Keer* (1 Bos. and Puller, 360), it was made a question whether a bond executed in Jamaica, with a scrawl of the pen, according to the custom in that island, should operate as such in England, even upon the strength of that usage.

The civil law understood the distinction and solemnity of seals as well as the common law of England. Testaments were required not only to be subscribed, but to be sealed by the witnesses. *Subscriptionem testium, et ex edicto prætoris, signacula testamentis imponerentur.* (Inst. 2. 10. 3.) The Romans generally used a ring, but the seal was valid in law, if made with one's own or another's ring; and according to Heineccius (*Elementa juris civilis secundum ord. Inst.* 497), with any other instrument, which would make an impression, and this, he says, is the law to this day throughout Germany. And let me add, that we have the highest and purest classical authority for Lord Coke's definition of a seal; *Quid si in ejusmodi cera centum sigilla hoc annulo impressero.* (Cicero. *Academ. Quæst. Lucul.* 4. 26.)

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COURT OF APPEALS.

VAN ALSTYNE AND OTHERS v. ERWINE, SHERIFF.

(11 *New-York Rep.*, 331. *Decided* 1854.)

In an affidavit for an attachment the facts stated must be sufficient to make a case upon which the officer can lawfully exercise his judgment; and if the facts legally tend to support the allegations in the affidavit with an intent of fraud alleged, such an affidavit will be held sufficient to confer jurisdiction upon the officer issuing the attachment.

T. Jenkins, for the appellant.

N. Hill, Jr., for the respondent.

DENIO, J. * * * * * * * * *

1. It is argued in the first place, that the application was not verified by the affidavit of the creditor, as required by the fourth section of the act. (2 *R. S.* § 4.) The application was in writing, and contained the several matters required to be shown to entitle the creditor to the remedy sought; but instead of the ordinary jurat, there was an affidavit at length indorsed on the application, setting forth and affirming in detail each of the matters of fact set out in the application, which were repeated in the affidavit. This was clearly sufficient. It was not the address of the petition, or its prayer, which were required to be verified; but the allegations of fact contained in it. An affidavit, which should have stated by way of reference that the several matters alleged in the petition were true, would have been clearly unobjectionable, and such is the form which the defendant's counsel considers the proper one. But the mode adopted was the same in substance. The only difference is that the facts were repeated in language, instead of being simply referred to. It cannot be said that the mode adopted does not conform to the statute as truly as the other. The affidavit was a part of the petition, though it did not in terms refer to it. (*Roberts v. The Chenango County Mutual Insurance Company*, 3 *Hill*, 501.)

2. It is objected that the application is in the disjunctive; that the debtor had departed from the State *or* was concealed within it,

with intent to defraud his creditors ; and it is said that the creditor should have stated his case under one or the other aspect, and not in the alternative. The remedy is precisely the same whether the debtor had absconded or was concealed, no difference whatever existing in the proceedings in the two cases. A case may be so circumstanced that, although it may be conclusively shown that the debtor has left his place of residence in order to defraud his creditors, by depriving them of their remedies, yet it may be impossible even to conjecture whether he has continued his flight beyond the boundaries of the State, or has resorted to some place of concealment in it. The affidavits disclose such a case in the present instance. If the objection is well founded there could be no proceedings under this statute in a case thus circumstanced. The debtor would have only so to conduct his evasion as to make it uncertain which course he had adopted, and he would avoid this remedy. I do not think the statute requires such a construction. The case referred to by the defendant's counsel implies, that where the circumstances are such that it is doubtful in what particular the defendant's conduct has brought him within a statute, the creditor has only to state all the facts, without electing which aspect he will adopt. (*The People v. The Recorder of Albany*, 6 Hill, 429.) In this case, the facts were laid before the officer, not, it is true, in the application, which is not the paper which should contain them, but in the affidavits of the witnesses, where they are required to be stated. The precise course was pursued which the court indicate as the proper one in the case cited. The same considerations apply to the other alternative—whether the debtor's intent was a general one to defraud his creditors, or whether it was to avoid the service of civil process. These remarks also answer the objection in this respect which was made to the affidavits of the witnesses.

3. It is then argued that the affidavits did not state facts sufficient to make a case upon which the officer could lawfully exercise his judgment. It must be conceded that the case made out was not a strong or very conclusive one ; but I think the facts legally tended to support the allegation of absconding or concealment, within the intent alleged. The witnesses concur in stating that the debtor had left his home and place of business to go to an adjoining county, for an alleged purpose, which would not naturally have required a journey of more than two or three days. He had

been absent about six weeks, and nothing had been heard of him. The witnesses who were his clerk and his brother, had each made diligent search and inquiry for him, and the latter had gone to the county where his pretended business lay, and learned that he had gone west, but where or for what purpose is not stated, and, if the witnesses are honest, could not be ascertained. This was a suspicious course of conduct for a merchant, and yet it might possibly be explained in an innocent sense. The weakest point in this case is the connection of this conduct with the alleged motive—the defrauding of his creditors. It is said in both affidavits that he was considerably indebted to the prosecuting creditor and others, and both witnesses add their belief that his object in going off related to his creditors. It moreover appears that the petitioning creditor's debt was pretty large. The most probable explanation would, therefore, be the one given in the affidavits, and yet every judge, I should think, would have wished to examine these witnesses a little further, and to have ascertained the proportion which his ready means bore to his debts. It must be kept in mind, however, that the law has committed to the county judge, and not to us, the duty of determining as to the cogency of the proof. The criticisms which the defendant's counsel asks us to indulge in would, if generally applied to such proceedings, render them extremely hazardous, not only to the parties setting them on foot, but to the officers concerned in their execution; for when we determine that a sufficient case was not made for the exercise of the judgment of the officers, we must consider the judge and all the parties trespassers in whatever they do. A liberal indulgence must be extended to these proceedings even upon questions of jurisdiction, if we would not render them a snare rather than a beneficial remedy. I am of opinion that sufficient has been stated to confer jurisdiction upon the officer. (*Matter of Faulkner*, 4 Hill, 598; *Johnson v. Moss*, 20 Wend., 145; *Miller v. Brinckerhoff*, 4 Denio, 120.)

* * * * *

SUPERIOR COURT.

CHARLES WELLS v. GEORGE A. HENSHAW.

(3 *Bosw.*, 625. *Decided* 1858.)

The Revised Statutes give a defendant a right to set off any judgment which he may have recovered against the plaintiff, which is in force and unpaid; and the Code has not repealed the provision.

Although the Code prohibits the bringing of an action upon a judgment between the same parties, in certain cases, without leave of the Court, this does not prevent the judgment from being pleaded as a set-off or counter-claim.

E. Seymour, for the plaintiff.

William Stanley, for the defendant.

Bosworth, Ch. J. The demurrer to the third defence or counter-claim is not well taken. This action is upon contract to recover the price of personal property sold. In such an action the Revised Statutes give the defendant a right to set-off any judgment which he may have recovered against the plaintiff, which is in force and unpaid. (2 *R. S.*, 354, *Sec. 32, Sub. 1.*)

Section 71 of the Code has not repealed this provision of the Revised Statutes. It was doubtless the object of Section 71 to prevent a party, who had recovered judgment, from bringing an action upon it for the mere purpose of increasing its amount by adding to it the costs of a suit upon it. (*Taft v. Braisted*, 4 *Duer*, 607.) The whole prohibition is, that "no action," shall be brought upon it, "between the same parties," without leave, &c.

When the Code declares, that a "defendant may set forth by answer as many defences and counter-claims as he may have," &c., it undoubtedly meant to provide, that anything, which by pre-existing law is a defence (and not declared by the Code to be no longer a defense), might be set up as a defence. (§ 150, sub. 2.)

Considered as a counter-claim, it answers the definition of that term, as given by the Code. It is a cause of action in favor of the defendant against the plaintiff, which existed at the commencement of this suit.

All that can be said of it, by the plaintiff is, that the defendant could not bring "an action" upon it, without leave of the Court.

But no law has declared that it may not be pleaded as a set-off or counter-claim. The Revised Statutes provide that it may be pleaded as a set-off. If the code may be regarded as having named the claim, a counter-claim, when set up as a defence, then it allows the judgment to be set up as such. I think it clear, that the demurrer to this part of the answer, is not well taken. But the plaintiff will be allowed to withdraw his demurrer, and to reply on terms.

Ordered accordingly.

SUPREME COURT.

HARDENBROOK CASE.

(8 Abb., 416. *Decided* 1859.)

Habeas Corpus to inquire into the detention of W. A. Hardenbrook, held in custody by the Sheriff of the city and county of New York.

H. A. Cram, for the petitioner.

A. R. Dyett, opposed.

Sutherland, J. The appearance of Wm. A. Hardenbrook before the referee, on the 21st of January, 1859, as a witness in the action of *Orr v. Hardenbrook*, was entirely voluntary.

He had been duly subpoenaed to attend as a witness in that action, on the 16th of December, 1858. He appeared on the 16th of December, 1858, and his examination was commenced on that day, but not closed; the case was adjourned to the 21st of December, 1858, when his examination was continued, and he was dismissed from the stand as the referee certifies.

The case was then adjourned to the 5th of January, 1859, on which day, the referee not appearing, the 21st of January, 1859, was appointed by the referee, as agreed upon by the parties, for the next meeting. On the 21st of January, 1859, Wm. A.

Hardenbrook appeared, at the request of Mr. Cram, the counsel for the defendant, and was further examined. He was arrested at the office of Mr. Cram, about an hour previous to his appearance before the referee on the 21st of January.

Without examining or expressing an opinion upon any other point raised on the argument of this matter, I am of the opinion that Wm. A. Hardenbrook could not claim the exemption from arrest given, by 2d Revised Statutes, § 51, to a witness, duly and in good faith subpoenaed.

This exemption from arrest is the mere personal privilege of the witness, which he can waive. (15 *Barb.* 28.)

I think the statute only extends to the witness the exemption when he is attending under the compulsion of a subpoena; and as in this case Mr. Hardenbrook's attendance as a witness before the referee, on the 21st of January, was entirely voluntary, he could not claim the exoneration from arrest given by the statute. His attendance on the 21st of January could not have been enforced by attachment.

Even before the Revised Statutes, it would appear that the exemption of voluntary witnesses from arrest was confined to voluntary foreign witnesses. (*Norris v. Beach*, 2 *John.*, 294; *Sanford v. Chase*, 3 *Cow.*, 381; *Hopkins v. Coburn*, 1 *Wend.*, 292.)

In Massachusetts it has been held that it is only when the witness is compelled by due process of law to attend, that he is entitled to protection from arrest. (*Ex parte Daniel McNeil*, 6 *Mass.*, 264.)

The prisoner must be remanded to the custody of the sheriff of the city and county of New York.

SUPERIOR COURT.

PIERCE v. SMITH.

(2 *Abbott*, 411. *Decided* 1856.)*S. D. Van Schaick*, for the motion.*C. L. Monell*, opposed.

WHITING, J.—This is a motion to set aside judgment for irregularity. The summons for the commencement of the suit was served on the defendant, a resident and elector of Stephentown, Rensselaer county, on the day of the last general election. Such service is forbidden by the Statute. (*Laws of 1842*, 109, *ch.* 130.)

It is said, however, that the irregularity was waived by the service of notice of appearance. That was served after judgment, and with the papers on which this motion was made. Such an appearance does not waive the irregularity, and must be treated as a notice only for the purpose of this motion.

Motion granted, with ten dollars costs.

SUPREME COURT.

HOMAN AND OTHERS, v. BRINCKERHOFF.

(1 *Denio*, 184. *Decided* 1845.)

The provision requiring a bond to be executed as one of the conditions to the issuing of an attachment (*Laws of 1831*, p. 404, § 35), is not satisfied by the execution of a *covenant* to pay \$100, or to pay all damages and costs, &c.; and where only such a covenant is executed, the justice does not acquire any jurisdiction to issue an attachment.

Where a constable upon an attachment which was void, for the reason that no sufficient bond had been given, seized property which was claimed by a stranger, who procured the same to be given upon executing the bond required in such case by 2 *R. S.* 231, § 33; *held*, that the plaintiff being a trespasser in taking the property, could not maintain an action on such bond.

ERROR to the Dutchess common pleas. Brinckerhoff sued Homan & Homan, before a justice, and declared in debt on bond in the

penal sum of \$36,14. After reciting that certain property had been seized on attachment issued by a justice in favor of Brinckerhoff against one Davis, which property was claimed by the defendant, William Homan, the condition of the bond was, that, in a suit to be brought on the bond within three months, the claimant would establish that he was the owner of the property at the time of the seizure; and in case he failed to do so that he would pay the value of the goods with interest. (2 R. S. 231, § 33.) The defendants pleaded the general issue, and other pleas not important to notice. The justice gave judgment for the plaintiff, and the defendants appealed. On the trial in the common pleas it appeared, that the attachment issued on the ground that Davis was about to remove or dispose of his property, with intent to defraud his creditors; and on issuing the attachment the justice took from the plaintiff Brinckerhoff and a surety, a writing, under seal, as follows: "We jointly and severally promise to pay to I. Davis the sum of one hundred dollars, or pay to him all damages and costs he may sustain by reason of the issuing of an attachment this day applied for by B. H. B., if he fail to recover judgment thereon; and if judgment be recovered, the plaintiff will pay the defendant all moneys which shall be received by him from any property levied on by the said attachment over and above the amount of such judgment, and interests and costs thereon." On the return day of the attachment the parties appeared, and Davis, by William Homan as his attorney, pleaded the general issue to the plaintiff's declaration. The justice gave judgment for the plaintiff in that suit. Afterward, and before execution was issued, Homan with his surety gave the bond on which this suit was brought. The defendants insisted that the justice did not acquire jurisdiction to issue the attachment; and consequently that the plaintiff could not recover. The court overruled the objection, and decided that the plaintiff was entitled to recover. Verdict and judgment accordingly. The defendants now bring error.

O. T. Coffin, for the plaintiffs in error.

J. L. De Long, for the defendant in error.

By the Court, BRONSON, Ch. J. The statute under which the plaintiff proceeded against Davis provides, that before any attach-

ment shall issue, there shall be a bond in the penalty of at least one hundred dollars, with a certain specified condition. (*Stat. of 1831, p. 404, § 35.*) The instrument which the justice took is not a bond. It is a covenant to pay one hundred dollars, or do something else, in a certain event. (*Rockefeller v. Hoysradt, 2 Hill, 616.*) I do not see how we can depart from the statute, and say that a covenant will answer the purpose. As there was no bond the justice did not acquire jurisdiction to issue the attachment, and the plaintiff was a trespasser in taking the property. He cannot maintain an action on the bond which was given to obtain the liberation of the property thus illegally taken.

It is said, and well said, that the justice obtained jurisdiction in the attachment suit when the defendant Davis appeared and pleaded to the declaration. The judgment rendered in that suit was therefore valid. But that will not aid the plaintiff. He did not hold the property under the judgment. No execution had been issued at the time the bond in suit was executed. If Homan had waited until execution had been issued, his claim would have come too late for this remedy. (*2 R. S. 231, § 33.*) Although the plaintiff had got a valid judgment, he had no other hold upon the property than such as the attachment gave him; and that as we have seen, was entirely void for want of jurisdiction to issue it. There must be a *venire de novo*.

Judgment reversed.

SUPREME COURT.

GENIN AND LOCKWOOD v. RAY TOMPKINS.

CAMMAN AND WHITEHOUSE v. THE SAME.

GILBERT AND JOHNSON v. THE SAME.

(*12 Barb., 265. Decided 1851.*)

* * * * *

Where a motion to discharge an attachment is founded upon affidavits on the part of the defendant, the plaintiff is at liberty to sustain his attachment by affidavits, in addition to those upon which it was granted; and if there was any insufficiency in the original affidavits, which is supplied by additional affidavits, the defect can not impair the attachment.

And if upon such additional affidavits such facts appear as authorize the court to infer that the defendant concealed himself within this State to avoid the service of a summons, the motion to set aside the attachment will be denied.

A warrant of attachment, under the Code (§ 228), is simply the written order of the judge, issued upon, and as a judicial determination from, the facts presented to him, that the case is one in which an attachment should be granted. It is one of the provisional remedies which the court is authorized to extend to suitors, and that in the simplest manner, and upon application to a judge at chambers. A *formal teste*, signature of the clerk, and seal, are not requisite. The signature of the attorney of the plaintiff to the warrant, should, however, be required.

Wightman, Clark, Bosworth, Tucker, O'Coner and Noyes, for the plaintiffs.

Hoffman, Sandford, Van Buren and Fowler, for the defendant.

By the Court, KING, J. In these three cases, an appeal has been taken from an order, at special term, allowing amendments to be made in each case, to the attachments issued therein, and upon such amendments being made, denying the motion of the defendant, to set aside such attachments. * * * *

* * * *

The next objection is, that the circumstances of the case, as disclosed upon the affidavits, do not warrant the conclusion that the defendant had departed from the State with intent to defraud his creditors, or to avoid the service of a summons, or kept himself concealed therein, with like intent.

It having been held in this court that, upon a motion to discharge an attachment, founded upon affidavits on the part of the defendant, the plaintiff was at liberty to sustain his attachment, by affidavits in addition to those upon which it was granted, if there was any insufficiency in the original affidavits, which is now supplied, the defect cannot now impair the attachment. All the affidavits in the several cases must therefore be considered. The attachments in these various cases differ in the recital of the occasion for which they were issued. Thus, in the case of *Genin and Lockwood*, the recital is, "that the said Ray Tompkins has departed from the State of New York with intent to defraud his creditors, or to avoid the service of civil process, or keeps himself concealed therein with the like intent." In the case of *Camman and White-*

house, the recital is, "that the said Ray Tompkins keeps himself concealed in the State of New York, with the intent to defraud his creditors." In the case of *Gilbert and Johnson*, the recital is, "that the said defendant has absconded from the State for the purpose and with the intent of avoiding the service of a summons, and to defraud the plaintiffs and his other creditors."

The circumstances under which the defendant was thus charged, as an absconding or concealed debtor, are briefly these: He was a stockholder, his place of business being in Wall street, his residence in Twenty-ninth street. In the early part of the 29th of January, he was engaged in receiving transfers of stock, on contracts maturing that day, to a large amount; in transferring stock to meet his contracts for delivery, maturing on that day; and receiving upon such transfers, considerable sums of money. The transfers made to him were, upon previous agreement, to pay cash on delivery, or statements at the time of transfer, that he would so pay the cash; when his certified checks were sent for, he postponed delivering them, saying they were not yet certified; the aggregate of his transactions on that day, was a large amount; about two o'clock, or shortly before, according to his own account, he suddenly became aware that he must fail: he thereupon, at two o'clock, left his office and Wall street; an earlier hour than it was usual for him so to do. Communicating to no one, except to Solomon Kipp, where he was going, he went first to the bank in which he kept his account, drew from it all his funds there—in fact somewhat overdrawing his account—and then proceeded to a tavern in Hudson street. On leaving Wall street he requested Mr. Kipp to inform Mr. Fowler, his counsel, where he was to be found. He remained in this tavern from the time he reached it until very nearly, if not quite midnight; his whereabouts known only to Charles Kipp, the keeper of the house, Solomon Kipp, a friend of the defendants, and to his counsel, Mr. Fowler, and Mr. Van Buren. While there he divided the property which he had with him in cash, into various parcels, and gave them to Solomon Kipp, to be delivered to various parties to whom he was indebted; and this having been done, he made a general assignment of all the residue of his property to Mr. Fowler for the benefit of his creditors. Whilst he remained there, Mr. Solomon Kipp, leaving him, went accompanied by his

wife, to take tea at the defendant's house, with the latter's family ; found there an officer who, under one of the attachments herein, had taken possession of the personal property in the house, and who had with him a summons to serve on the defendant. To the officer's inquiry, where the defendant was, Mr. Kipp answered that he did not know. Kipp afterward returned to the tavern in Hudson street, where the defendant still was, and late at night accompanied the defendant, first to the house of Mr. Okill, a friend and neighbor of the defendant, whom they awoke from his sleep, and thence proceeded to the defendant's house, where the defendant found the officer in charge in bed, woke him and received from him the summons which he had to serve.

It is evident that there was no departure from the State, for any purpose, or with any intent. It remains to be considered whether there was any concealment within the State, with intent to defraud his creditors, or to avoid the service of a summons. It is contended that no sufficient concealment existed to warrant the attachment ; that the distribution of his property among his creditors was a lawful act, and one from which an intent to defraud creditors could not be inferred ; that the services of a summons would not have interfered with any conceivable object of his alleged concealment ; whilst an attachment might have so interfered ; that an intent to avoid that which was harmless, could not be inferred, when the result would be to place in his creditors' hands a remedy more extensive than that which he is considered as avoiding ; and further that his temporary absence was natural, and sufficiently explained by his desire upon the sudden change of his affairs, to consult his counsel, make a lawful distribution of his property, and avoid the distress of his family, occasioned by the first news of his misfortunes.

But whatever other objects the defendant may have had, and although the result may prove that by avoiding that which was harmless he has afforded to his creditors the opportunity of availing themselves of a remedy which they could not otherwise have had, it is difficult to avoid the conclusion, from the circumstances of this case, that the defendant concealed himself temporarily ; and that part of the intent of such concealment was to avoid the service of a summons. He was liable to various actions, for debts contracted under circumstances strongly suspicious, unless

explained; without explanation to any one, or informing anybody, except a personal friend, where he was going, he left his place of business at an unusual hour, went to an unusual place, and remained there for an unusual time; his place of temporary resort was communicated only to Solomon Kipp, and to his two counsel. Charles Kipp as keeper of the house was almost necessarily acquainted with his presence there. None of his family, or acquaintance, would, from anything that appears, have thought of looking for him in the place to which he resorted; whilst the defendant was still there, Solomon Kipp went, accompanied by his wife, to the defendant's house to take tea; found there an officer with a summons against the defendant, and told such officer that he did not know where the defendant was to be found; yet, after tea, had no difficulty in finding the defendant in the same place where he had left him, and remained with him until quite late at night; when he accompanied the defendant to his residence. It is difficult upon all these circumstances, to arrive at any other conclusion than that the concealment of the defendant was, in part, at least intended to avoid the service of a summons.

It is true, that it might happen to almost any man, to be absent as long as the defendant was, without those connected with him being aware of the place in which he was to be found; but each case must depend upon its own circumstances; and in this instance the circumstances seem to have been sufficient, in the first place, to warrant the issuing of the attachment, on the ground that the defendant had departed from the State, or kept himself concealed therein, with intent to avoid the service of a summons; and upon fuller inquiry, to sustain the attachment, on the ground that the defendant concealed himself within the State, with intent to avoid the service of a summons.

Another question remains to be considered, as to the form of the attachment. It was contended, at the special term, that the warrant of attachment mentioned in the Code, was process of the court; and as such, should be tested in the name of a justice of the court, sealed with its seal, signed by a clerk of the court, and subscribed by the attorney issuing it, and be allowed by a justice of the court, and should also have a return day.

The justice before whom the motion came on to be argued at the special term, sustained the objection, except as to the return

day; but allowed the several warrants of attachment to be amended, by adding the proper test; the seal of the court, the signature of the attorney, and the word "allowed" before the signature of the judge signing the warrant.

It is now contended that the warrant of attachment is process for the commencement of an action, and as such, not amendable; and consequently that the judge erred in allowing any amendments to be made.

Upon the argument the case of *Morgan v. Avery* (2 Code Rep. 91), was referred to, as establishing the doctrine that a warrant of attachment was process of the court, issuing by its special order; but it was stated from the bench, by one of the justices who sat in general term, when that case was heard on appeal, that no such point was raised or decided by the general term in that case; and undoubtedly the general practice, both of the judges and of the bar, since the introduction of the Code, has been at variance with a construction, requiring warrants of attachment to be under the seal of the court, formally tested, signed by the clerk, and allowed by the justice. They have been in the form of a simple warrant, under the hand of the judge issuing the same.

The term used in the Code is, warrant of attachment: a warrant of attachment must be obtained from a judge of the court in which the action is brought, or a county judge. (*Code*, § 228.) Warrant is a term, well known to the law; originally derived from the criminal law, it has been applied in many civil proceedings; for instance, in justices' courts, and in the attachment proceedings existing before the Code took effect. It was originally under the hand and seal of the magistrate, by whom it was issued; though sufficient, even at common law, without a seal. In criminal warrants, and in cases of justices' warrants, seals are now dispensed with by statute, and may well be dispensed with in attachment warrants; the seal usually affixed — a mere wafer — adding nothing to the authenticity of the magistrate's signature, and the warrant, even at common law, being sufficient without a seal. (*See 4 Burns Justice, tit. Warrant, 4, p. 266; 1 Chit. crim. Law, 38, 5th Am. ed. Beekman v. Traver, 20 Wend., 67*), though it decides that the term warrant imports a seal, does not decide that a warrant without a seal is insufficient; and this case is cited in support of the *dictum* in *Smith v. Randall* (3 Hill, 495).

The warrants of attachment, in this case, are in the usual form of all such warrants issued since the Code, and are framed according to the usual form of warrants, changing the recitals and command to suit the different purpose for which these issue. They are in the name of the people; directed to the sheriff; recite an application on oath, from which the facts appear, which under the statute authorize the warrant; they command the sheriff to attach the property, etc., and to proceed thereon according to law; the amount to be attached is limited under the practice adopted in this district before the late amendment to the Code requiring such limitation; and the warrant is dated at the place where issued, and signed by the judge issuing the same.

Nothing is said in the statute which indicates the necessity of a seal of the court, or of a clerk's signature. It is simply the written order of the judge issued upon, and as a judicial determination from, the facts presented to him, that the case is one in which an attachment should be granted. It is one of the provisional remedies which the court is authorized to extend to suitors, and that in the simplest manner, and upon application to a judge at chambers; and under sections 174 and 176 amendable, if amendment be needed, to conform to the provisions of the Code.

It seems to me that the intention of the legislature is so clearly indicated, that the warrant of the judge alone should be sufficient, as not to authorize the court to affix other requisitions of formal teste, signature of clerk and seal. The signature of the attorney to the warrant should, however, be required from motives of convenience which must be obvious to all.

So far as the return day is concerned, none is usually contained in warrants; in criminal cases, the command is to bring the party forthwith before the magistrate, to be dealt with according to law; but the statute would require this upon arrest, even if omitted in the warrant. In these warrants of attachment the command is to seize the property and proceed thereon according to law; and the law has pointed out what, upon seizure, is the officer's duty. (*Code*, § 232.)

It seems to me, therefore, that the amendments authorized to be made to the warrants of attachment were unnecessary, and that in their original condition the warrants were, as to form, sufficient,

although the attorney's signature should, properly, have been affixed.

The conclusion is, that the order made at special term, in each of the above cases, should be affirmed, with costs.

SUPERIOR COURT.

WM. B. FAIRBANKS AND OTHERS v. SMITH BLOOMFIELD AND
ANOTHER.

(5 *Duer*, 434. *Decided* 1856.)

Where an officer seizes property by virtue of an attachment, he holds possession of it subject to the order of the attachment plaintiff the same as if such property had been seized under an execution; and where such plaintiff refused to deliver on demand property wrongfully seized, it was held that he was guilty of a conversion.

R. S. Emmet, for the plaintiffs.

C. Jones, for the defendants.

By the Court, DUER, J.

* * * * *

Overruling, as we must do, all the objections which have been raised, in the present case, to the validity of the mortgage, it follows, that the plaintiffs, on the 23d of August, became, at law, the absolute owners of the vessel, as there was then a default in the payment of their debt, and the temporary right of possession in the mortgages was then determined. The plaintiffs, therefore, from that day, were entitled, as owners, to demand and recover the vessel, or its value, from any and every person by whom the possession, no matter under what pretext or title, might then be held. If the vessel, therefore, was, on that day, and subsequently, in the possession, or under the control of the defendants, and they refused, upon a proper demand, to surrender her to the plaintiffs, they must be liable in the present action.

The defendants on the preceding 25th of July, had caused the vessel to be seized, under an attachment against the property of McLellan, the former owner, and the complaint avers, and the

answer, by not denying the allegation, admits, that the seizure was made by their express direction. The attachment, it appears, from its terms, was not issued for the general benefit of the creditors of McLellan, but was a process, in the commencement of a suit, instituted by the defendants, in their own names, and for their own exclusive benefit. It was, therefore, a proceeding, subject, like all other proceedings in the action, to their personal control, to be prosecuted and enforced, or revoked and abandoned, at their pleasure.

The regularity of the attachment, and the jurisdiction of the court by which it was issued, are not denied, and as the temporary interest of McLellan in the vessel had not then ceased, it is not denied that the original seizure was justifiable and lawful. Such an interest, it has been decided, in our own courts, is a proper subject of levy, under an execution, and therefore under an attachment ; and it was conceded by the counsel for the plaintiffs, and we shall, therefore, concede, that such is also the law in Connecticut. But, on the 23d of August, the interest of McLellan in the vessel wholly ceased, and we can perceive no reasons for doubting that, from that time, the detention of the vessel, under the attachment, contrary to the will of the plaintiffs, the true and only owners, was just as unlawful, as the original seizure would have been if they had possessed, at that time, the same exclusive title. Hence, if this detention may be justly attributed to the acts or authority of the defendants, it is a necessary conclusion that they were guilty of the conversion with which they are charged. As the answer admits that the delivery of the vessel was demanded from the defendants, on behalf of the plaintiffs, after the 23d of August and before the commencement of this action, and as the fact was very clearly proved upon the trial, it is evident that the subsequent detention of the vessel must be attributed to them, if it was in their power, and it was their duty, to have complied with the demand.

We think, that they had the legal power, and that it was their legal duty, to comply with the demand, and that they have rendered themselves liable to the plaintiffs, by their refusal.

What are the grounds, I propose next to consider, upon which this liability of the defendants, is denied ?

It is said that the vessel, when its delivery was demanded was still held, by the officer in Connecticut, under the attachment, and

was, therefore, in the custody of the law; and we are told that when property is thus situated, it is settled law that the owner can maintain no action for its recovery or value, but must seek his remedy in an application to the court under whose process, or order, the property is held; and, in support of this broad proposition, we are referred to the decision of the Supreme Court, in the early case of *Jenner v. Jolliffe*, as a controlling authority. (6 *John.*, 9; 9 *id.* 381.) The proposition, that property, in the custody of the law, cannot be made the subject of a new and separate action, when properly understood and limited, is undeniably true, and the case to which we were referred, the purport of which was greatly misunderstood, well illustrates the true meaning and application of the rule.

The plaintiff in *Jenner v. Jolliffe*, brought the action, which was trover, to recover the value of a quantity of timber, of which he was the owner, and which the defendants had caused to be seized, under an attachment, in Canada; but, as it appeared that the process was regular on its face, was issued by a court of full jurisdiction, and, by its terms, directed the seizure of the very property in question, as that of the plaintiff who was named as the defendant in the suit, the Supreme Court properly, and necessarily, held that the action was not maintainable. This case, therefore, only proves what, probably, has never been denied, or doubted, that a defendant, in a suit in which his property is seized or attached, under a process or order of the court, and to abide its final determination, is not permitted to try the validity of the proceeding — when the jurisdiction of the court is undoubted — as plaintiff, in a separate action; for this is the very question to be determined in that to which he is already a party, as the defendant.

But the case is widely different, when the property seized is that of a stranger to the action, and the seizure is not directed by the terms of the process. The property seized is not then in the custody of the law, for the seizure is, itself, an unlawful act, which renders the officer making, and the plaintiff directing it, at once, liable as trespassers, and gives to the true owner an immediate right of action against them. The familiar case is, where the goods of A. are seized, under an execution against the property of B.; and whether the seizure is made under an execution, or under an attachment, is plainly immaterial. What has been said of an

unlawful seizure, must be equally true of an unlawful detention. When the goods detained belong to a stranger to the action, and their detention is not justified by the terms of the process, they are not in the custody of the law, and the owner is, at once, entitled to the remedy, by an action against those who wrongfully withhold from him the possession to which he is entitled. Here, the vessel when the interest of McLellan had ceased, was no longer in the custody of the law, and, as its detention was no longer justified by the terms of an attachment, which related to the property of McLellan alone, the plaintiffs had an immediate right of action against those to whom the wrongful detention was imputable.

We think, that in reason, and in law, it was imputable to the defendants.

The demand of the vessel was properly made from the defendants themselves, and was properly made in the place where they were found. They were the sole plaintiffs in the suit in which the attachment was issued—it was by their direction that the vessel was seized, and hence, the officer, holding the attachment, acted as their agent in making the seizure. It was not a manual delivery of the vessel that was asked, but an order directing the officer, as their agent, to make that delivery to the plaintiffs. It was at their own peril—the peril of showing that the plaintiffs were not, as they claimed to be, the owners of the vessel, that they refused to comply with such a demand; and, as to their power to direct a delivery by the officer, we cannot doubt that they had the same right to release the property from an attachment in which they alone were interested, that they would have had to release it from an execution, had such been the form and nature of the process by which it was held; and if such was their right, its exercise was their duty.

As to the objection, that, when the vessel was demanded, no tender was made of the fees of the officer and of the other costs of the attachment, it scarcely deserves attention. No such payment or tender was required; and had it been required, the plaintiffs were under no obligation to comply with the request. The delivery, to which, as owners of the vessel, they were entitled, was unconditional, and by refusing to make it, the defendants converted the property to their own use. It is plain, from the evidence, that they refused to deliver the vessel, because they

meant to retain it, under the attachment, in order that its proceeds, when sold, might be applied to the satisfaction of their own debt. It is plain, that with this view they meant to deny wholly, the title of the plaintiffs; and as the denial was proved to be groundless, they have no right to complain that judgment is rendered against them.

SUPREME COURT.

VAN VOORHIS v. BUDD.

(39 Barb., 479. Decided 1863.)

It is a well known rule that the law recognizes but one christian or baptismal name; and a letter between the christian name and surname the court will hold as surplusage.

APPEAL from a judgment of the county court of Dutchess county, affirming the judgment of a justice of the peace.

Charles Wheaton, for the plaintiff.

H. H. Hustis, for the defendant.

By the Court, BOWEN, J. This action was brought against the defendant to recover damages for the seizure and sale of a horse, the property of the plaintiff. The defendant justifies under a tax warrant, issued to him as collector of the town of Fishkill, in the county of Dutchess, for the year of 1861.

The tax is assessed upon the roll to Henry D. Van Voorhis. The proof on the trial, however, showed, that the plaintiff was also known in the town as Henry Van Voorhis, and he was the person intended to be charged with the payment of the tax. Levi G. Van Kleeck, a witness for the defendant, testified that he was one of the assessors of the town of Fishkill during the year 1861, and made the assessment against the plaintiff to Henry D. Van Voorhis. He saw him and spoke to him about the assessment, and knew him by the name of Henry Van Voorhis. His name was upon the assessment roll for the year previous as Henry D. Van Voorhis, and the witness took the name from that roll. The plain-

tiff himself was examined as a witness, and said he was more frequently called Henry than William Henry Van Voorhis.

The assessors are, by diligent inquiry to be made between certain times named in the statute, to ascertain the names of all the taxable inhabitants in their respective towns or wards, and also all the taxable property real or personal within the same, and from these they are to prepare the assessment rolls in the manner prescribed. When the collector receives the tax warrant he is required to call at least once upon the person taxed and demand payment of the tax charged to him on his property. If the person refuse or neglect to make payment the collector shall levy the same by distress and sale of the goods and chattels of the person who ought to pay the same. It is evident that this law cannot be executed as to the names of persons charged with the payment of taxes with the same precision and exactness formerly observed in regard to the names of persons made parties defendants in actions at law. In these latter proceedings, when the defendant pleaded his misnomer in abatement he was bound to furnish the plaintiff with his real name and swear to the truth of the plea, and the plaintiff might have leave to amend his declaration or institute a new action, and the remedy as well as the right of action was preserved to him, notwithstanding the error in the defendant's name. In the assessment of a tax no such result would ensue. The statute provides no other means than the diligence and inquiries of the assessors to ascertain the real names of the tax payers; and if an error is made it is fatal to the recovery of the tax. Reasonable certainty then is all that can or should be required. If the party defendant was as well known by the name given in the declaration as by his baptismal name, that was regarded as a good replication to a plea of misnomer in abatement. And so in the assessment of the tax in question, if the plaintiff was known by the name of Henry Van Voorhis, that was a sufficient justification for charging him with the payment of his share of the public taxes by that name, whatever might have been his real name. This court has held, in the case of *Wheeler v. Anthony* (10 Wend., 346), that a tax assessed to the widow and heirs of Zophar S. Wheeler deceased, when they actually owned and occupied the farm charged, was a sufficient compliance with the directions of the statute to justify the collector in executing the warrant by the seizure and sale of

a cow to satisfy the tax. In respect to the presence of the letter D. between the words Henry and Van Voorhis upon the tax roll, it is to be regarded as surplusage, upon the well known rule that the law recognizes but one christian name. (See *Franklin and others v. Talmage*, 5 *John.*, 84; *Rosevelt v. Gardner*, 2 *Cowen*, 463.) There was no proof offered upon the trial to show that there was any other person in the town of Fishkill known by the name of Henry Van Voorhis, or Henry D. Van Voorhis, to whom the charge might have been referred; so that there could be no confusion and no uncertainty in regard to the person whose duty it was to pay the tax.

The judgments in the justice's and in the county court should be reversed, with costs.

COURT OF APPEALS.

PHILO STEPHENS AND HENRY DWIGHT, RESPONDENTS, v. THE PHCENIX INSURANCE COMPANY OF HARTFORD, APPELLANT.

(41 *New-York Rep.*, 149. *Decided* 1869.)

Where a corporation is created by, and doing business in, a State, it is to be deemed an inhabitant of such State and treated as a citizen for all purposes of suing and being sued.

Samuel Hand, for the appellants.

John H. Townsend, for the respondents.

MASON, J. It was decided in the *Bank of Augusta v. Earle* (13 *Peters*, W. S. R., 512), that a corporation can have no legal existence out of the bounds of the sovereignty by which it is created; that it exists only in contemplation of law and by force of law; and when that law ceases to operate, the corporation can have no existence. It must dwell in the place of its creation. The same was affirmed in the case of the *Louisville, Cincinnati and Chicago Railroad Company v. Letson* (2 *How. U. S. R.*, 497). It was also held in that case that a corporation, created by and transacting business in a State, is to be deemed an inhabitant of the State, capable of being treated as a citizen for all purposes of

suing and being sued, and that the averment of the facts of its creation and the place of transacting business is sufficient to give the Circuit Court of the United States jurisdiction.

This question was very fully reconsidered in the case of *Marshall v. The Baltimore and Ohio Railroad Company* (16 How. U. S. R., 314); and was reaffirmed, and it was held in that case, that a citizen of Virginia might sue the Baltimore and Ohio Railroad Company in the Circuit Court of the United States of Maryland, and that an averment that defendants are a body corporate, created by the legislature of Maryland, was sufficient to give the court jurisdiction.

The question was again considered in the case of the *Covington Bridge Company v. Shepherd* (20 How., U. S. R., 227, 232), and it was there said that this must be regarded as the settled law of the court; and it was further held in that case, that an averment, that the Covington Bridge Company were citizens of Indiana, was sufficient to give jurisdiction to the Circuit Court of the United States, because the company was incorporated by a public statute of the State, which the court was bound judicially to notice. The jurisdiction in these cases was maintained upon the assumption, and the decision of the court was, that a corporation is a citizen within the meaning of the judiciary act. I know the earlier cases held otherwise, but they are disapproved by these cases, where the question was fully considered.

I do not think that the case of the *Ohio and Mississippi Railroad Company v. Wheeler* (1 Black. R. 286), can be said to interfere with these cases, much less to overrule them. It is held in that case, that a corporation exists only in contemplation of law and by force of law, and can have no legal existence beyond the bounds of the sovereignty by which it is created, and that it must dwell in the place of its creation.

It is also held, that where a corporation is created by the laws of a State, the legal presumption is that its members are citizens of the State in which alone the corporate body has a legal existence, and that a suit by or against a corporation, in its corporate capacity, must be presumed to be a suit by or against citizens of the State which created the corporation body; and no averment or evidence is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States.

These views are confirmed in the opinion delivered in this court so far as that case goes, in the case of *Merrick v. Santvoord* (34 N. Y. R., 218). It is there said that a corporation is an artificial being, and has no dwelling, either in its office, its depots, or its ships. Its domicil is the legal jurisdiction of its origin, irrespective of the residence of its officers, or the place where its business is transacted. It is also said that a corporation cannot migrate from one sovereignty to another, so as to have a legal, local existence within the latter sovereignty. (*See S. C., page 220.*) The fact that this corporation appointed an agent within this State, and does business here, or that a portion of its directors reside here, does not in any manner affect its domicil or its right to be regarded as a citizen of another State. (34 N. Y. R., 205; 2 *Abbott N. S.*, 357; 3 *Metcalf R.*, 564.)

* * * * *

SUPREME COURT.

MEEKS v. NOXON.

(1 *Abbott*, 280. *Decided* 1855.)

THIS was a motion to set aside a judgment and all proceedings subsequent thereto.

The 7th of November, 1854, was the day upon which a general election of the State was held. The defendant in this action was a resident of Saratoga county and an elector therein, and the sheriff of that county, on the day above-mentioned served a summons and complaint upon him. No arrest was made. The defendant made no answer, and judgment was entered. The irregularity in serving the summons was the ground stated for moving to set the judgment aside.

Stevens & Hoxie, and *J. C. Mott*, for the motion.

H. D. Townsend, opposed.

CLARKE, *J.* With regard to the service of civil process on election day, until 1842, the words of the statute were, that "no civil process shall be served, &c., on either of the days during which such

election shall be held;" but in 1842 (*Laws of 1842, p. 109*), it was amended so as to read, "No declaration by which a suit shall be commenced, or any civil process, or proceeding in the nature of civil process, shall be served," &c. The case of *Wheeler v. Bartlett* (1 *Edw. Ch. R.*), to which the counsel for the plaintiff refers, was decided many years before the amendment. In that case, the Vice-Chancellor says "that the section (as it then stood) has reference to process which causes duress." I doubt whether that section admitted of so limited an interpretation. In using so comprehensive a term as process, it may be well supposed that the legislature wished to provide not only against arrest or duress, but against any molestation that might interfere with the elector in performing the high and sacred duty which the elective franchise imposes. However this may be, the amendment of 1842 sets the question at rest. Commencing a suit by declaration caused no duress, and was equivalent to the present mode of commencing an action by summons, when there is no order of arrest.

The present case comes within the meaning of the amended section; and, as the summons was served on an elector on a day when an election was held, the process and all the proceedings under it were void. It is unnecessary to consider the other question.

Judgment and subsequent proceedings set aside, with \$10 costs of motion.

SUPREME COURT.

HALL v. PENNEY.

(11 *Wend.*, 44. *Decided 1833.*)

The fleeces, or the yarn or cloth manufactured from the fleeces of *ten sheep*, are exempted from execution while in the hands of a householder, whether he be or be not the *owner of the sheep*.

P. G. Childs, for the plaintiff in error.

W. J. Hough, for the defendant in error.

By the Court, NELSON, J.—There is some evidence upon which it is contended that the plaintiff below had more wool

in 1829 than the probable produce of *ten sheep*; but I think the facts do not warrant such a conclusion. The wool from which the cloth in question was manufactured, the defendant had in 1828, and it does not appear that he had any other wool in that year. The only question in the case is, whether wool or articles manufactured from it, not exceeding in quantity the fleeces from *ten sheep*, are exempt from execution in the hands of a person *not owning any sheep*. The statute enacts that "all sheep, to the number of ten, with their fleeces and the yarn or cloth manufactured from the same," shall be exempt from execution, 2 *R. S.* 255, § 169, *sub.* 4. The object and intent of the statute cannot be mistaken; it is to secure to the family of a householder, wool or the article manufactured from it, equal in amount to that grown on a given number of sheep, and the terms used in the act were intended to effect that intent. No other purpose could have been within the view of the legislature. The exemption of the sheep alone would be a useless boon; it is the wool grown upon the sheep which gives value to this provision to a poor family. It is a settled rule, that such construction shall be given to a statute as may best answer the intention which the makers had in view. The intention of the makers of a statute is sometimes to be collected from the *cause* or *necessity* of making it; and when this can be discovered it ought to be followed with reason and discretion in the construction to be put upon it, although such construction seems contrary to its letter. *Bacon's Abr. tit. Statute*, p. 384. These are familiar principles in construing statutes, and are in point. The judgment of the common pleas therefore is right, and must be affirmed.

COURT OF APPEALS.

OAKLEY v. ASPINWALL *et al.*(3 *New-York Rep.*, 548. *Decided* 1850.)

The Revised Statutes direct that no judge of any court can sit as such in any cause in which he would be disqualified from being a juror by reason of consanguinity or affinity to either of the parties; this is merely declaratory of universal principles of law, which make no distinction between the case of interest and that of relationship. This law and the reasons which uphold it apply to the judges of every court in the State, from the lowest to the highest. He cannot sit, although both parties to the action should consent; where no jurisdiction exists by law, it cannot be conferred by consent.

Hiram P. Hastings, for the plaintiff.

Francis B. Cutting, for the defendant.

HURLBUT, J. It is suggested by the petition of the respondent, that the decision of this court by which the judgment of the superior court in his favor was reversed and a new trial ordered in this case, was entered through inadvertence, and he prays that both the judgment of this court and the *remittitur* may be vacated, and that the appeal may be reargued. This application is based on several grounds, the most important of which is, that the appeal was argued before seven members of the court, one of whom, Judge Strong, was related to the applicants Aspinwall within the seventh degree, and was therefore disqualified to sit as a judge and to take part in the decision of this cause. That two members of the court voted to affirm the judgment of the court below, and five, including Judge Strong, voted for reversal; and that without the vote of the latter the judgment would not have been reversed.

It appears that upon the appeal being moved for argument, Judge Strong informed the counsel for both parties of his relation to the Messrs. Aspinwall, the appellants, and that because of it he should decline to sit in the case; but that the counsel consented that he should sit, and that he was particularly urged to it by the counsel for the respondent; that he finally consented to hear the cause, upon its being suggested that the appellants Aspinwall were not parties in interest, and would not suffer by the judgment, as they were indemnified by a Mr. Baker who had the real interest

in the matter in litigation. Under these circumstances the judge retained his seat — but his opinion and vote were adverse to the party whose counsel was mainly instrumental in inducing him to serve, and hence this motion, which is made by the same counsel, who now alleges that he was not authorized by his client to consent in the premises, and that if he were, such consent is not an answer to the present motion.

It is difficult, under the circumstances, to regard this application with favor, since the position in which the court is placed in respect to this cause, has been brought about mainly by the officious intermeddling of the counsel for the moving party, with the scruples of a judge who, with a proper sense of duty, promptly declined to sit in the cause. But the unfavorable aspect of the motion in this point of view, must not cause us to overlook the principles upon which it is founded, which are of too great importance in the administration of justice ever to be lost sight of.

The appellants Aspinwall were defendants in the judgment from which this appeal was taken — they were personally liable to pay it, as between them and the respondent, and execution to enforce it might have gone against their property. They may have been indemnified — but that did not exempt them from primary liability on the judgment, and hence did not divest them entirely of interest in the case. They were then parties to the suit, and having such an interest as to give rise to the objection now taken to Judge Strong's participation in the decision of the cause, because of consanguinity to them; and the question is, what effect had such participation upon the judgment pronounced by this court?

The first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate, in the same cause. Mankind are so agreed in this principle, that any departure from it shocks their common sense and sentiment of justice. It was long ago reported, on the authority of *Holt*, that the mayor of Hertford was laid by the heels for sitting in judgment in a cause when he himself was lessor of the plaintiff in ejectment, although he, by the charter, was sole judge of the court. (1 *Salk.* 396.) No information has reached us at this day tending to show that the treatment which the mayor received on this occasion was deemed too severe by his cotemporaries, although his apology, to wit—that he

was sole judge of the court—has been held by some modern judges to excuse them for determining upon matters and causes in which their relations were parties or were interested. But it seems to me far better, that causes as to which the sole judge of a court is presumed to be biased in favor of one of the parties should remain undetermined until the legislature should provide an appropriate tribunal for their decision, than that the principle which demands complete impartiality in a judge should ever be violated. The urgency of a particular case is not so much to be regarded as the elevation and honor of courts of justice, whose dignity and purity constitute a main pillar of the State.

Partiality and bias are presumed from the relationship or consanguinity of a judge to the party. This presumption is conclusive and disqualifies the judge. A justice of the peace who was a son-in-law of the plaintiff, insisted on retaining jurisdiction of a cause, notwithstanding it was objected against by the defendant; and the supreme court held that this was of itself evidence that the trial was not fair and impartial, and reversed the judgment. (*Bellows, &c., v. Pearson*, 19 *John, R.* 172.) In the case of *The Washington Ins. Co. v. Price et al.* (1 *Hopkins' Ch. R.* 1) Chancellor Sanford declared that it is a maxim of every code in every country that no man should be a judge in his own cause; that it is not left to his discretion or to his sense of decency whether he shall act or not; that when his own rights are in question he has no authority to determine the cause; that so well was this principle understood that in every court consisting of more judges than one, the judge who is a party in a suit takes no part in the proceedings or decision of the cause, and that he knew of no example of the contrary conduct in this country.

The provisions of our revised statutes on this subject profess to be merely declaratory of universal principles of law, which make no distinction between the case of interest and that of relationship, both operating equally to disqualify a judge. Hence the statute declares, that “no judge of any court can sit as such in any cause to which he is a party or in which he is interested, or in which he would be disqualified from being a juror by reason of consanguinity or affinity to either of the parties.” (2 *R. S.* 275, §2; *Revisers' Notes*, 3 *R. S.* 694.)

After so plain a prohibition, can anything more be necessary to

prevent a judge from retaining his seat in the cases specified? He is first excluded by the moral sense of all mankind; the common law next denies him the right to sit, and then the revisers of our law declared that they intended to embody this universal sentiment in the form of a statutory prohibition, and so they placed this explicit provision before the legislature, who adopted it without alteration and enacted it as the law. The exclusion wrought by it is as complete as is in the nature of the case possible. The judge is removed from the cause and from the bench; or if he will occupy the latter, it must be only as an idle spectator and not as a judge. He cannot sit as such. The spirit and language of the law are against it. Having disqualified him from sitting as a judge, the statute further declares that he can neither decide nor take part in the decision of the cause, as to which he is divested of the judicial function. Nor ought he to wait to be put in mind of his disability, but should himself suggest it and withdraw, as the judge with great propriety attempted to do in the present case. He cannot sit, says the statute. It is a legal impossibility, and so the courts have held it. (*Edwards v. Russell*, 21 *Wend.*, 63; *Foot v. Morgan*, 1 *Hill*, 654.)

The law applies as well to the members of this court as to any other; or if there be any difference it is rather in favor of its more stringent application to the judges of a court of last resort as well, because of its greater dignity and importance as a tribunal of justice, as that there is no mode of redress appointed for the injuries which its biased decisions may occasion. The law and the reasons which uphold it apply to the judges of every court in the State, from the lowest to the highest.

It was, however, urged at the bar, that although the judge were wanting in authority to sit and take part in the decision of this cause, yet, that having done so at the solicitation of the respondent's counsel, such consent warranted the judge in acting, and is an answer to this motion.

But where no jurisdiction exists by law it cannot be conferred by consent—especially against the prohibitions of a law, which was not designed merely for the protection of the party to a suit, but for the general interest of justice. (*Low v. Rice*, 8 *John.* 409; *Clayton v. Per Dun*, 13 *id.* 218; *Edwards v. Russell*, 21 *Wend.*, 63; 21 *Pick.*, 101.) It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions

the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important, in that respect, that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined; but the State, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind.

The party who desired it might be permitted to take the hazard of a biased decision, if he alone were to suffer for his folly — but the State cannot endure the scandal and reproach which would be visited upon its judiciary in consequence. Although the party consent, he will invariably murmur if he do not gain his cause; and the very man who induced the judge to act, when he should have forborne, will be the first to arraign his decision as biased and unjust. If we needed an illustration of this the attitude which the counsel for the moving party in this case assumed toward the court, the strain of argument which he addressed to it, and the impression which it was calculated to make upon an audience are enough to show, that whatever a party may consent to do, the State cannot afford to yield up its judiciary to such attack and criticism as will inevitably follow upon their decisions made in disregard of the prohibitions of the law under consideration.

The constitution of 1846 has been referred to, but so far as I can perceive it is silent on this subject. It declares that there shall be a court of appeals composed of eight judges, but does not define its jurisdiction nor enter into the details of its organization; and in absence of an express declaration to that effect, it is not to be intended that the framers of the constitution designed to abrogate the great and salutary rule which disqualifies a judge from acting in the cases referred to. There is so much reason and fitness in the rule, that nothing short of a solemn and express declaration of the sovereign will ought to be deemed sufficient to abrogate it. In the absence of such an expression in the constitution, it seems proper to hold that the jurisdiction conferred on the judges of this court in general terms, is subject to an implied exception in favor of the operation of the rule by which they could be excluded from

sitting in cases where they may be interested or related to the parties. Such an exception is implied under the most comprehensive grant of jurisdiction by statute (5 *Coke's R.* 118 *b* ; *Wingale's Maxims*, 170); and I perceive no reason why it should not be, under a constitutional grant of power.

The views expressed by Judge Bronson in *Pearce v. Delamater*, (1 *Comst.*, 1), in reference to the right of a judge of this court to sit in the review of cases, where he has taken part in the decisions of the court below, do not, I think, necessarily conflict with the doctrine I have endeavored to maintain, as there may be reason to believe that the framers of the new constitution designed to change the law on that subject; and as was said, in that case, "there was nothing in the nature of the thing which made it improper for a judge to sit in review upon his own judgments." But the present case is different; the disqualification under consideration exists at common law, and is necessary in order to preserve the moral dignity of courts and the due administration of justice; and since it was not embraced in the former constitution of this State, the silence of the new constitution on the subject can not be urged to show that it was the design to abrogate it.

But it may be said that this court consists of eight judges; that a less number cannot constitute it, and therefore from necessity its members must sit in all cases.

The constitution declares that it shall be "composed of eight judges," and omits to provide that a less number may constitute the court. The absence of such customary provision has led some to suppose that the framers of the constitution designed to fix the number of judges inflexibly at eight, although it would be extremely difficult to assign any reason for their having done so. I think it is rather to be presumed that the design was to create an efficient court, one capable in view of the accidents of life, of assembling and conducting business with reasonable facility, and that no unnecessary obstacle was designedly presented in its very constitution, to the convenient discharge of its duties. It is, I think, safe to conclude, that the omission to declare, that a less number than eight might constitute the court, was either accidental, or it was designed that the legislature should determine what number should make a quorum. I incline to adopt the latter view, which seems to derive support from section 25 of article 6 of

the constitution, which directed that the legislature at its first session after the adoption of the constitution should *provide for the organization of the court*. The constitution did not prepare the court for service. It declared that such a tribunal should exist, provided from what number and class of judges it should be constituted, enjoined upon the legislature the duty of organizing it, and left its jurisdiction and course of procedure to be defined by law.

Legislative action was necessary before the court could be said to exist for any practical purpose. Without this it could not have assembled and given audience to suitors; and it owes its being not more to the constitution than to the act of 1847, and subsequent statutes which fashioned it and endowed it with form and legal vitality. The constitution called for the court, and presented the materials of which it might be formed, and the legislature, under the express authority of the constitution, organized it. The authority to organize implied a right to ordain whatever was necessary or fit in order to form the court and give it efficient action, without going counter to the constitution, which is silent on the subject of a quorum. The legislature then, having before them the material for composing the court, and rejecting none by it, were at liberty, I think, to dispense with the attendance of so many of the judges as in their wisdom might be deemed expedient in order to guard against accident, render the court capable of efficient action, and to avoid the necessity of any judge's sitting when interested, or related to a party to a suit. This was the first step to be taken in the act of organization and most necessary to its success; and I am inclined to concede to the legislature complete authority over this subject to the extent assumed by the statutes referred to.

It being provided by law that six members of the court shall constitute a quorum, a judge who is interested, or related to a party to a suit, can not be required to act from necessity, unless when at least three of the judges may be so circumstanced—a case not likely to occur.

It appearing then that Judge Strong could neither lawfully hear nor take part in the decision of this cause—but that he did both—I am of the opinion that no proper determination has been made upon this appeal—that the judgment thus inadvertently entered, and the remittitur, ought to be vacated, and that the cause ought to be reargued.

SUPREME COURT.

WHITE v. SYRACUSE AND UTICA RAILROAD COMPANY.

(14 *Barb.*, 559. *Decided* 1853.)

A charter of incorporation, like a contract between individuals, is to be construed according to its spirit and meaning, as well as its letter.

By the Court, EDWARDS, J. The opinion expresses the principle stated in the syllabus.

SUPREME COURT.

TAYLOR v. HEATH.

(4 *Denio*, 592. *Decided* 1847.)

To authorize the issuing of an attachment by a justice of the peace against a non-resident, pursuant to the *thirty-third* section of the act to abolish imprisonment for debt, the party applying for the process must make an affidavit of the fact of non-residence, and execute the bond required by the Revised Statutes, on application for an attachment before a justice of the peace. Per Beardsley, J. Where there was no sufficient affidavit, and it did not appear in any way that the defendant was a non-resident; *held*, that the judgment should be reversed.

ERROR to the Albany common pleas. Taylor sued Heath by attachment on the 7th December, 1842, returnable the 9th of said December. The constable stated in his return what property he had attached, but that he had not served the attachment personally on the defendant. The plaintiff appeared on the 9th, but the defendant did not, and a short summons was issued returnable the 12th of December, to which the return was, that the defendant, after a due search, could not be found. The plaintiff appeared, but the defendant did not. Declaration on a note and an account. Witness sworn, etc. Judgment for the plaintiff.

On *certiorari* the common pleas reversed the judgment, because, as is said, the justice had no jurisdiction of the person of the defendant.

R. M. Townsend, for the plaintiff in error.

L. J. Lansing, for the defendant in error.

BEARDSLEY, J. The judgment in this case was rendered by the justice upon proceedings by way of attachment and short summons. By the act to abolish imprisonment for debt, passed in 1831, suits may be instituted against non-resident defendants by attachments. (*Laws* 1831, 403, § 33.) This was a new remedy, substituted in certain cases for the former process by warrant, which in those cases the statute abolished.

There was a written application for the attachment, but it did not state the ground on which it was asked for. There was also an affidavit made by the plaintiff, but it is so drawn as to be nearly unintelligible. It is impossible to gather from it that the defendant was a non-resident.

If, therefore, proof of that fact was requisite to authorize the issuing of an attachment, these proceedings were irregular, and the judgment rendered by the justice was consequently erroneous.

But to this it is answered that no affidavit whatever was necessary; that where the defendant is in fact a non-resident, an attachment may issue as a matter of course, without proof of such non-residence. This view of the law, I admit, is sustained by the opinions of most respectable judges, but from which, I am constrained to add, I totally dissent.

In *Clark v. Luce* (15 *Wend.*, 479), the plaintiff made affidavit before the justice that the defendant was a non-resident of the county, upon which an attachment was issued against him. On the return day both parties appeared, and the defendant pleaded in abatement, amongst other things, that the affidavit was not in conformity with the statute, and on demurrer the justice gave judgment for the plaintiff. The defendant then pleaded the general issue, which was tried and the plaintiff had judgment. This was carried by appeal to the common pleas, where the issue of fact was tried by a jury and a verdict found for the plaintiff. The report states that the court of "common pleas also passed upon the issues of law, and adjudged the pleas to be bad, and judgment was accordingly rendered for the amount of the verdict and costs." That judgment was brought to this court by writ of error and affirmed, the opinion being delivered by Savage, Chief Justice. He began by remarking that "the regularity of the issuing of the attachment was the principal, perhaps the only point in the case." Various provisions of the statute on the subject were then referred

to; but without at all passing upon the sufficiency or insufficiency of the affidavit which had been made, he precluded all inquiry upon that subject by holding that no affidavit whatever was necessary in such a case, as an attachment against a non-resident might issue as of course under the *thirty-third* section of the act of 1831.

This, it seems to me, cannot be regarded as an adjudication upon the present question, for the point was not then before the court. The judgment appealed from was rendered upon an issue of *fact*, and not an issue of *law*. (2 R. S. 258, § 186.) The issues of law which arose on the pleas in abatement, had been decided against the defendant, and those pleas were waived by pleading the general issue. Upon this issue the judgment appealed from was rendered — as I understand the statute on the subject, the issue of fact alone was in question in the common pleas; the issue of law which had been formed and decided in the justice's court, having been waived, and therefore not carried up by the appeal. (*Id.* §§ 186, 194, 210 to 216; 6 *Hill*, 621.) In this state of the case, no question as to the regularity of the attachment could be made in the common pleas. If the defendant would have made such a point he should not have appeared to the action, or should have rested on his pleas in abatement; but having pleaded in chief, and been beaten on the issue of fact, his remedy by appeal was upon the merits of the controversy, and could not reach the question of the regularity of the attachment. Such being the case of *Clark v. Luce*, the opinion of the late chief justice was upon a point not material to be considered, nor strictly before the court for decision. It cannot, therefore, be regarded as authority which the court are bound to follow, although certainly entitled to most respectful consideration.

I am aware that in *Bates v. Relyea and Wright* (23 *Wend.*, 336), the late Mr. Justice Cowen appears to have taken the opinion in *Clark v. Luce*, as a controlling authority, upon the strength of which it was held that neither an affidavit or a bond was necessary. It is plain enough that Judge Cowen was not satisfied with that opinion, but upon the maxim *stare decisis, et non quieta movere*, he declared that he felt himself bound by it.

It is unnecessary now to say how far, if at all, a single adjudged case, believed to have been erroneously decided, should ever be regarded as absolutely authoritative in the same court. For myself,

I think it should never be allowed to preclude an examination of the point adjudged, nor deter the court from exercising an independent judgment on the question. Much more is due to a train of decisions, resulting in a rule of property which has been acted upon and acquiesced in for a considerable period of time; but I cannot agree to follow any case, of comparatively recent date, on the single ground that the point has been adjudged. But if I am right in my view of *Clark v. Luce*, no principle applicable to the present case, or to that of *Bates v. Relyea and Wright*, was involved in it, and of consequence it decided nothing relevant to either. We could not, therefore, even if disposed to do so, refer to *Clark v. Luce*, and repose ourselves on *stare decisis*, for the question before us was not involved in that case, and no case can ever be regarded as authoritative beyond the direct point in judgment.

Nor should the case of *Bates v. Relyea and Wright*, be allowed to control the decision we are now to make. That was trespass *de bonis asportatis*, in which the defendants justified under an attachment issued in their favor against the plaintiff. The question before the court arose on the *second* plea, which set up that they prosecuted the plaintiff by attachment, alleging that he was at the time a non-resident of the county, but without stating in the plea that this fact had been proved to the justice who issued the attachment. The court held the plea good upon the authority of *Clark v. Luce*, Judge Cowen remarking that it was a question "of construction upon the words of an act," and even if the balance of the minds of the court should be against the opinion in *Clark v. Luce*, they could not "without departing from the maxim *stare decisis, et non quieta movere*, indulge the inclination." The case of *Bates v. Relyea and Wright*, was decided exclusively on authority, and not upon an examination of the statute on which the case arose, it therefore does not greatly add to the strength of the precedent case. The same remark is applicable to *Vân Etten v. Hurst* (6 *Hill*, 311). All of these cases depended as the present does also, upon positive law: upon what the statute contains. I think it will be seen that a provision in the statute, explicit in its terms, and direct to the purpose, was entirely overlooked, in deciding them, and which, to my mind, is a decisive objection to them as authority. Add to this that *Clark v. Luce*, so far as respects the present question, was an opinion only, and not a decision; and that *Bates v.*

Relyea and Wright was a collateral action, and not, as this is, a direct proceeding by way of *certiorari* and writ of error, to review what had been done in the justice's court, and, I think, we need not be embarrassed on the score of authority.

By the Revised Statutes suits might be commenced by attachment whenever it should satisfactorily appear to the justice, that the debtor had departed or was "about to depart from the county where he last resided, with intent to defraud his creditors, or to avoid the service of any civil process; or that such debtor keeps himself concealed with the like intent." (2 R. S. 227, § 11, p. 230, § 26.) But the application for such attachment was required to be in writing, and to be accompanied by the affidavit of the creditor or his agent, in which the sum due was to be stated, "and the grounds upon which the application is founded; and the facts and circumstances to establish such grounds shall also be verified by the affidavit of two disinterested witnesses." A bond with approved security, was also to be given by the applicant, all which being done, and under the Revised Statutes all these were indispensable, the attachment might be issued. (§ 27, 28, 29.)

Then came the act to abolish imprisonment for debt, the *thirty-third* section of which declares, that, "whenever by the provisions of the thirtieth section of this act, no warrant can issue, and the defendant shall reside out of the county, he shall be proceeded against by summons or attachment." The next succeeding section authorizes an attachment to issue when the property of the debtor has been fraudulently assigned, &c., but before any attachment shall issue in *such* case, or in the cases provided for in "the revised statutes, the plaintiff shall by his own affidavit, or that of some other person or persons, prove to the satisfaction of the justice, the facts and circumstances to entitle him to the same;" and so much of said revised statutes "*as requires any other or different proof for the issuing* of an attachment than that required by this section, is hereby repealed." (§ 35.) By this section, in terms, a bond is required in all cases provided for by this act.

This section dispenses with the affidavit of two disinterested witnesses which the Revised Statutes required; (2 R. S. 230, § 28); but not so with the affidavit of the creditor himself, or of some one in his behalf, which the Revised Statutes also made necessary. No attachment therefore can now issue under the authority of those

statutes without such affidavit of the party or his agent. It must also be made when an attachment is applied for under the *thirty-fourth* section of the act to abolish imprisonment for debt. (See § 35.) And in my judgment it is equally necessary, before an attachment can lawfully issue against a non-resident under the thirty-third section of that act. It is authorized, in such case, because the defendant is a non-resident, and one against whom no warrant can issue; but these facts and circumstances must be proved by the affidavit of the party or his agent, or an attachment cannot issue, in this, more than in any other case. It is never to issue as of course, but only when proper cause is shown. This, as it seems to me, cannot admit of a doubt, for the forty-third section of the act to abolish imprisonment for debt declares that all the provisions of the Revised Statutes, which require proof to be made, and security to be given, before an attachment can legally issue, and which are not expressly repealed by said act, nor inconsistent with its provisions, shall be in full force, and shall apply to the provisions of said act to abolish imprisonment for debt, "*so far as the same relate to proceedings in courts before justices of the peace.*" Issuing an attachment against a non-resident defendant, is a proceeding in court, before a justice of the peace.

The provision of the Revised Statutes, which requires an *affidavit* of the applicant for an attachment, or his agent, proving the grounds on which it is applied for, is not repealed expressly or by implication, by the act to abolish imprisonment for debt; nor is it inconsistent with anything contained in said act. Such affidavit is therefore now required by law before an attachment can issue under the *thirty-third* section, or indeed, in any case whatever. Section *forty-three* seems to have escaped the attention of the court, in deciding the two cases which have been referred to, or they would have been otherwise disposed of.

The attachment, in this case, was issued without authority, and against law, and the judgment of the common pleas, reversing that of the justice, was correct, and should be affirmed.

BRONSON, C. J. and JEWETT, J., concurred in the opinion that the judgment of the common pleas ought to be affirmed, on the ground that it did not appear in any way that the defendant was a non-resident; but without expressing any opinion on the question discussed by BEARDSLEY, J., whether the statute required an affidavit in such a case.

COURT OF APPEALS.

SKINNION v. KELLEY.

(18 *New-York R.*, 355. *Decided* 1858.)

Upon an application to a justice of the peace for an attachment, slight evidence was presented of an intent on the part of the defendant to defraud his creditors: *Held*, although the evidence was so insufficient that the action of the justice would be reversed upon a direct proceeding to review it, the process is to be deemed valid when attacked in a collateral action.

In such cases the process is not to be held void if the magistrate had before him evidence legally tending to establish the jurisdictional fact, and requiring the exercise of his judicial judgment as to its cogency.

APPEAL from the Supreme Court. Action for taking certain personal property of the plaintiff. The defendant justified under an execution against the plaintiff, issued upon a judgment rendered by a justice of the peace, in an action commenced by attachment. The affidavits on which the attachment was allowed were sworn November 18th, 1853, and stated that Skinnion owed other debts than that to the applicant, the defendant in this case; that he was a tenant of the applicant and had raised that season a good crop of grain — oats, corn, buckwheat and wheat — and had cut some twenty-six tons of hay; that he had disposed of and removed the greater part of the hay, and over four hundred bushels of oats and sixty bushels of buckwheat; that persons were engaged in removing the hay and grain; that not more than four tons of hay could then be found on Skinnion's premises, no wheat or buckwheat, but thirty or forty bushels of oats, which Skinnion said belonged to another man; that Skinnion had often been requested to pay and refused so to do, and plainly told deponent that he did not know whether he should pay him or not; that Skinnion had in his possession a wallet, which had the appearance of being well filled with bank bills. Upon the trial at the Otsego circuit, the judge decided that the affidavits were insufficient to give the justice jurisdiction to issue the attachment, and excluded evidence of the subsequent judgment and execution. The defendant excepted. The plaintiff had a verdict and judgment, which having been affirmed at a general term in the sixth district, the defendant appealed to this court.

Lyman Tremain, for the appellant.

Thomas Smith, for the respondent.

JOHNSON, Ch. J. The attachment, the validity of which is collaterally attacked in this action, was issued under sections 34 and 35 of the act to abolish imprisonment for debt (*Laws of 1831, ch. 300*), as amended by chapter 107, of the Laws of 1842. To authorize an attachment under those sections it must, among other requisites, satisfactorily appear to the justice that the defendant is about to remove from the county any of his property, with intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of or secrete any of his property with the like intent. The plaintiff, by his own affidavit or that of others, must, before the attachment can be issued, prove to the satisfaction of the justice, the facts and circumstances to entitle him to the same.

In this class of cases, where facts are preliminarily to be proved as the basis of the right to employ the process, if the proof has a legal tendency to make out the case required by the statute, although it be so slight and inconclusive, that, upon a direct proceeding to review it, the magistrate's action would be reversed, yet in a collateral action the process will be deemed valid. It will be so deemed because the justice, having proof presented to him, and being required by law to determine upon the weight of the proof, has acted judicially in making his determination. His decision may be erroneous but is not void. (*Miller v. Brinkerhoff*, 4 *Denio*, 118; *Van Alstyne v. Erwin*, 1 *Kern.*, 331.) With what liberal indulgence to officers and parties, courts judge, even upon such jurisdictional questions, and the ground of policy on which that course rests, are shown in the last case cited.

The only point in which a defect of proof can be claimed to exist in this case respects the intent to defraud creditors. Certainly, the proof presented was not strong, and upon a direct proceeding to review the action of the justice in issuing the attachment, it would not be held as sufficient. But coming up in this collateral way it seems to me that there was proof upon the point of intent, which presented to the justice a case for the exercise of his judgment as to its cogency. It was proved that the debtor was a farm tenant of Kelley; was indebted to him and to other persons, and had been frequently applied to by him for payment, and as frequently had refused it; had removed most of his farm crops and disposed of them; appeared to have money in his possession, and not only still refused to pay presently, but added that he did

not know whether he should pay or not. These circumstances, with others corroborative of them and of the same nature, although they were far from conclusively proving an intent to defraud creditors, still tended that way. They, no doubt, created a conviction in the mind of the creditor and the justice that such was the purpose of the debtor, and we cannot say they were so completely without force as proof as to render the proceeding of the justice utterly void, and the party a trespasser in availing himself of the process which the justice awarded.

The judgment must be reversed and a new trial ordered.

SELDEN, J., expressed no opinion; all the other judges concurring.

SUPREME COURT.

SMITH v. LUCE.

(14 Wend., 237. Decided 1835.)

In a proceeding by *attachment*, under the act to abolish imprisonment and to punish fraudulent debtors, the plaintiff must state in his affidavit the origin of his demand, that is, whether founded *upon contract or upon judgment*; and must also state the *facts and circumstances* upon which the application is made, as that the defendant had declared his intention to remove his property, &c., or had assigned it without consideration, or secreted it, or any other circumstance indicating fraud; the *mere belief* of the plaintiff is not sufficient.

* * * * *

ERROR by *certiorari* from this court to a justice of the peace. Luce commenced a suit by attachment, under the "act to abolish imprisonment for debt and to punish fraudulent debtors." *Session Laws, 1831, page 404, § 34, 35.* The attachment was served on the day to which the trial of the cause was adjourned; the defendant appeared and objected to further proceedings, on the ground of the insufficiency of the plaintiff's affidavit, which it was alleged was made in reference to the act to *abolish imprisonment, &c.*, and the attachment was issued under the old law. The objections were overruled, and the justice proceeded to hear the proofs of the plaintiff, and rendered judgment against the defendant for \$30⁸²/₁₀₀ damages and costs of suit. The substance of the affidavit is set

forth in the opinion delivered by the Chief Justice. The defendant sued out a *certiorari* from this court.

O. Robinson, for the plaintiff in error.

A. P. Grant, for the defendant in error.

By the Court, SAVAGE, Ch. J. The only question in this case is, whether the affidavit was sufficient to authorize the issuing an attachment.

It is admitted that the proceeding was under the act of 1831. *Session Laws*, p. 404, §§ 34, 35. By the 34th section of that act, it is enacted that suits may be commenced before justices by attachment, *upon contract, express or implied, or upon any judgment for \$50 or less*, "whenever it shall satisfactorily appear to such justice that the defendant is about to remove from the county any of his property, with intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of or secrete any of his property with like intent, whether such defendant be a resident of this State or not." The 35th section declares, that before any attachment shall issue in such case, or in cases provided for in the revised statutes, 2 *R. S.* 230, "the plaintiff shall, by his own affidavit, or that of some other person or persons prove to the satisfaction of the justice *the facts and circumstances* to entitle him to the same, and that he has such a claim as is specified in the last preceding section against the defendant, over and above all discounts which the defendant may have against him, specifying as near as may be the amount of such claim or the balance thereof." The affidavit upon which the attachment in this case issued stated that the defendant was indebted to the plaintiff in the sum, as near as the deponent could estimate the same, of \$30.45, over and above all discounts, and that deponent believed "that said J. S. is about to remove or has removed from said county his property, with intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of or secrete his property with the like intent."

By the 35th section, the plaintiff was bound to prove to the satisfaction of the justice *the facts and circumstances* which entitled him to the attachment. Those facts and circumstances are, 1. That

the plaintiff has such a demand as the statute describes; and 2. That the defendant is about to remove his property, or has assigned, disposed of or secreted it, or is about to do so, with intent to defraud his creditors. The affidavit is defective as to the origin of the demand; it should state that it was *upon contract* or *upon judgment*. It is also defective in *omitting to state the facts and circumstances* from which the plaintiff draws the conclusion that the defendant is about to do the acts which he specifies. The plaintiff's *own belief* is neither a fact or a circumstance upon which the justice can exercise his judgment. It is not sufficient that the plaintiff is satisfied of the unlawful acts or intentions of the defendant. The justice must be satisfied, and he must be so satisfied from proof of facts and circumstances; not the belief of any one. Facts must be shown to the justice which shall leave no reasonable doubt on his mind that the defendant has committed, or is about to commit the fraudulent acts mentioned in the statute: For instance had the affidavit stated positively that the defendant had declared his intention to remove his property to avoid the payment of his debts; or that he had assigned or secreted his property, being indebted at the time, and setting forth the circumstances, such as want of consideration for an assignment, or any other circumstance which equally indicates fraud; such an affidavit would be proof upon which the judge could act judicially and draw his own conclusion, whether the defendant had done the acts, or was about to do them, which would authorize the issuing an attachment. It is argued that it is enough if the justice is satisfied. I answer he must be satisfied judicially, and has no right to be satisfied, unless upon legal proof; proof of facts and circumstances, not belief alone. The judgment must be reversed; but as this is a *certiorari* direct from this court to the justice, there are no costs.

COURT OF ERRORS.

WILLIAM M'DONALD, FRANKLIN LIVINGSTON, WILLIAM GRIFFETH
AND SETH EDDY, Appellants, v. JOHN NEILSON, Respondent.

(2 Cowen, 139. Decided 1823.)

* * * * *

Where a party, whose personal property has been seized under an execution against him, and a sale of it forced, with great rigor and oppression, and at enormous sacrifice, by the deputy sheriff, acting in concert with the creditor, who is the chief bidder at the sale, is induced, in order to avoid the sacrifice of the whole property, to yield to the demands of the creditor, and to give him a bond and mortgage for a large sum of money, so as to cover not only the amount of the execution, but also debts due from a son of the debtor who is insolvent, the sale will be declared oppressive and illegal by a Court of Equity; * * *

* * * * *

A sheriff is not bound to obey the instructions of a party, in executing a *fi. fa.* if he sees it will produce a great sacrifice of property;

But should rather postpone the sale; especially where the plaintiff cannot sustain any injury by the delay.

He should take all necessary and lawful measures to secure the sum he is directed to levy;

But as to time, place and manner of sale, he is vested with a sound discretion.

* * * * *

B. F. Butler, for the appellants.

Van Vechten and Henry, contra.

WOODWORTH, J. The object of the bill is, to be relieved against a bond and mortgage, given by the respondent to William M'Donald, and a note of fifty dollars to Seth Eddy.

The appellants are charged as parties to a fraudulent combination to oppress the respondent, by the sacrifice of his property at a sheriff's sale, in order to indemnify themselves for certain debts against John Neilson, Jun., a son of the respondent.

On the 22d November, 1819, the appellants and others attended the sale, when personal property to a large amount was sold by Griffith, and purchased chiefly by M'Donald & Eddy. It is not necessary to occupy time, by a minute statement of facts. I shall merely observe, that the respondent was a man in affluent circum-

stances, having a large real and personal estate of from \$12,000 to \$15,000. The amount of the execution was \$480.83. It appears that the respondent requested Griffeth, the officer, to delay the sale, until he could send three miles and procure the money; Griffeth declined to take anything but specie. The respondent then offered to pay in specie the next day, or as soon as a person could go to Waterford and return; security was offered for the performance. These propositions were rejected on the ground that M'Donald insisted on an immediate sale, although the execution had been but a few days in the officer's hands. M'Donald, in his answer, admits the demand of specie was with the view of preventing the respondent from obtaining the means of satisfying the execution, with as much facility as he otherwise might have done, and with the view of making advantageous purchases, in the hope of saving a large amount due to him from John Neilson, Jun.; believing that the respondent had fraudulently combined with his son, to prevent the collection, and was morally bound to refund the avails of a raft of which he fraudulently got possession. After selling the out-door property and when the officer was about to commence the sale of the furniture, the respondent was prevailed on by the advice of his friends, in order to prevent a further sacrifice, to make an accommodation, by which \$2,500 was secured to M'Donald in satisfaction of the execution and his debt against John Neilson, Jun. The property sold was then given up.

I have thus glanced at the material facts; the question is, can a contract, entered into under such circumstances, be upheld in a Court of Equity? I am clearly of opinion it cannot, without overruling long established and well settled principles, hitherto considered of vital importance to protect against that species of oppression, which is sought to be justified under the forms of law. With respect to Griffeth, certain duties devolved on him as a public officer; he was undoubtedly to take all necessary and lawful means to comply with the exigency of the writ, and thereby to secure to the plaintiff in the execution, the fruits of his recovery. As to time, place and manner of sale, a sound discretion was vested in him; but full confidence that it would not be abused. It is indispensably necessary to the due administration of justice, that the exercise of this discretion should never be under the direction of one party, so as to oppress and bring ruin on the other. The

officer is bound to consult his own judgment, to act firmly, but temperately, and in no case can he, without just reprehension lend himself to the views of either party, or become the instrument to avenge their real or imaginary wrongs.

The conduct of the officer was altogether unjustifiable, wanton and oppressive; it is neither palliated or excused, by proving that he acted under the orders of the plaintiff in the execution. After property, valued at \$1,200 and upwards had been sold for \$300, a suspension takes places, the negotiation is concluded and the mortgage given. Did the parties treat on equal terms? Was the respondent under no restraint? Was he induced to compromise to save his property from further sacrifice? It seems to me, there can be but one opinion on this subject. If so, can a lawful contract be upheld by such means? Here was a pressure upon distress, which in the view of a Court of Equity, entitled the respondent to relief.

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	SUTHERLAND, J.		*	*	*	*	*	*
*	*	*	*	*	*	*	*	*

As to the other appellants, the evidence of combination is overwhelming. The testimony of Hunter, as to the declaration of Griffeth, that he was afraid the respondent would return before the day of sale, and get the proceedings stayed, receives strong and ample confirmation from Griffeth's whole subsequent conduct and from all the circumstances of the case. It is the first glimmering we discover of the spirit and object with which the proceedings were conducted; and makes him an accessory before the fact, to all the subsequent acts of violence and oppression. It is followed up by an abandonment of all official discretion, and an entire submission to the plaintiffs in the execution. Instead of acting as minister of the law, and guarding its process against misapplication and abuse, he became the passive instrument of a party in the accomplishment of his illegal purposes. It was contended upon the argument, that he was not bound to incur the hazard of a suspension or adjournment of the sale, and that the law will not inquire into the extent of the hazard. Is it indeed true, that the law will not exercise a supervision or control over the discretionary acts of its ministerial officers? That they are omnipotent and

irresponsible in the exercise of the power intrusted to them? "It is a proposition," as was once said by Ld. Hardwicke, "too monstrous to be debated."

The law will make the most liberal intendment in favor of its ministerial officers, when acting within the limits of their authority; but it will not permit them to resort to the *ultima ratio*, when the legitimate object which it is their duty to effect, can be accomplished by milder means. Has a sheriff a right to load an unresisting debtor, who quietly submits to his authority, with bonds and fetters, to guard against an escape in carrying him from his home to a prison? and yet it is the most effectual way of preventing an escape.

It was the duty of Griffeth, under the circumstances of this case, to have suspended or adjourned the sale; and his conduct throughout the whole of this transaction deserves the severest reprehension.

* * * * *

SAVAGE, Ch. J. * * * * *
* * * * *

The sheriff must obey his writ. It is his duty, therefore, on a *fi. fa.* to collect the money by the return day. He must not show favor, or give unreasonable delay, neither should he be guilty of oppression, or use more severity than is necessary. (*Bac. Abr. Sheriff*, (N) *Dalt. Sheriff*, 109, 110.)

In this case the execution was delivered to him on the 10th November, 1819, returnable at the next January term. He levied on the 13th November and advertised the property for sale on the 22d. The respondent was absent when the levy was made, and returned the evening before the sale. On the morning of the 22d, he requested a postponement of the sale, to which Griffeth answered, he should obey the instructions of M'Donald. He requested M'Donald to agree to the postponement, which he refused. I incline to credit this statement of facts rather than the relation of *J. Neilson, Jun.* M'Donald told the deputy that he should demand specie of the sheriff, and the deputy then gave notice that he should require it of the purchasers.

It is not at all surprising that M'Donald should have been willing to distress the respondent; smarting under the losses, disappointments, and perplexities he had suffered, resulting, as he sup-

posed, from the wanton and malicious officiousness of the respondent, he, no doubt, felt gratified with the prospect of receiving remuneration and inflicting punishment upon him. The sheriff, however, ought not to lend himself to any one, and thus become the instrument of gratifying the vindictive feelings of an exasperated party. I am rather inclined to believe, that in this instance, the deputy acted under an impression that he was bound to obey M'Donald's instructions. In this he was mistaken. He was bound to exercise a proper discretion, and when he saw that there must be a great sacrifice of the respondent's property, it was his duty to have postponed the sale. (*Tincom v. Purdy*, 5 *John. Rep.* 345.) A reasonable time should have been given the respondent to obtain the money, particularly when the sheriff could not possibly sustain any loss from the indulgence.

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TALCOTT v. ROSENBERG.

(8 *Abb. N. S.*, 287. *Decided* 1870.)

APPEAL from a judgment of the Marine Court.

This action was brought by James Talcott against Felix J. Rosenberg, and another, in the marine court of the city of New York.

Du Bois Smith, for the plaintiff.

A. Blumenstiel, for the defendants.

By the Court, LOEW, J. On this appeal, three questions are presented for our consideration.

1st. Were the affidavits, upon which the attachment was issued by the court below, sufficient to sustain the same, and confer jurisdiction on that tribunal?

2d. Was it necessary that the attachment should bear the seal of the court; and if so, could the defect of its omission be cured by amendment? And

3d. Was the sheriff's return sufficient; and if not, had the court

below the power to order it to be amended? As to the sufficiency of the affidavits, it may perhaps be that the plaintiff did not make out a very strong case, but still I think the facts set forth are sufficient to support the allegation that the defendants had disposed, and were about disposing, of their property, with the intent to defraud their creditors. From plaintiff's affidavit it appears that when the goods were purchased the defendants stated that they had twenty-five thousand dollars cash capital in their business, over all their debts and liabilities; that they had other property in addition, which made them worth forty thousand dollars, and *that they were doing a cash business*; and yet a few weeks thereafter, when the indebtedness became due, they declared that they had no money, and had not had any for many days, except what they had borrowed, and that they did not know whether they were solvent or not. It further appears, that within a month prior to this time their stock of goods had amounted in value to twenty thousand dollars, but that it had now suddenly become reduced in amount to two thousand dollars; which they were then packing up and removing. It also appears, that within the same space of time they had secretly removed many thousand dollars worth of goods from their store, and sent the same to Trenton, N. J., New Brunswick, Rochester and Albany, all directed to "S. Lowenstein," a brother of one of the defendants.

It seems to me that this affidavit was sufficient to authorize the issuing of the attachment. Such was our opinion on the argument; and upon reflection, I, for my part, can see no reason for changing it. A liberal indulgence is to be extended to these proceedings, even upon questions of jurisdiction; and although the case be neither strong nor conclusive, still, if enough is set forth in the affidavit to require of the officer the exercise of his judgment in the matter, and the facts legally tend to support the allegation that the defendant has assigned and disposed of, or is about to assign and dispose of, his property, with the intent to defraud his creditors, it will be sufficient. (*Van Alstyne v. Erwin*, 11 N. Y., 340, 341; *Bascom v. Smith*, 31 N. Y., 595; 4 *Hill*, 598, 602; 5 *How. Pr.*, 386.)

With regard to the second point, it may be said that the law creating the marine court provided that all process issuing out of said court should be sealed with the seal thereof (2 *Rev. Laws of* 1813, p. 383, § 111). In *Churchill v. Marsh*, 4 *E. D. Smith*, 369,

this court held that a compliance with said provision of the law is still requisite and necessary.

Upon the doctrine of *stare decisis*, that decision, unless manifestly erroneous (which I am not prepared to say it is), controls, and should be adhered to by us in the present case.

It follows, therefore, that the attachment should have been issued under the seal of the court.

The counsel for the respondent, in support of his argument that the seal was unnecessary, has referred us to section 57 of the judiciary act of 1847 (*Laws of 1847, ch. 280, § 57*), which declares that no process of a court of record, which shall be subscribed with the name of the attorney or party by whom it is issued, except such as shall be issued by special order of the court, shall be deemed void or voidable by reason of having no seal.

This provision, I am inclined to think, will not aid him. Although the law creating the marine court declares that it shall be a court of record, still it is such only for certain purposes. Its jurisdiction is special and limited; nor does it, in the exercise of that jurisdiction act as a court of record between parties (1 *Duer*, 158; 2 *E. D. Smith*, 595; 23 *Wend.*, 375; 6 *Hill*, 590; 19 *Abb. Pr.*, 236). That court is nowhere mentioned in the judiciary act; and I am satisfied, from the whole tenor of the act, that the provision referred to was intended by the legislature to apply only to courts of record having general jurisdiction, and where the summons or other process is issued and subscribed by the attorney or party to the action, and not by the clerk of the court, as is the case in the marine court. The intention of the law-makers being ascertained, that should govern and control in construing a law, although such construction seem contrary to the letter of the statute. (*Tounell v. Hall*, 4 *N. Y. [4 Comst.]*, 140; *Reno v. Pindar*, 20 *N. Y.*, 301).

Let us now inquire whether the defect of the absence of the seal could be cured; and if so, what power the marine court had to amend this process on the return day thereof. It has been held that a defect which can be waived by a party is an irregularity; whereas if it cannot be waived it is a nullity, and renders the process or proceeding in which it occurs totally null and void. (*McNamara on Nullities*, 2, 3, 6; *Holmes v. Russell*, 9 *Dowl.*, 487; *Clapp v. Graves*, 26 *N. Y.*, 420.) I presume it cannot very well be questioned but what the defendants had the right to waive the

omission of the seal to the warrant, and that if they had appeared in the action and pleaded to the merits, the defect would have been waived. (1 *E. D. Smith*, 417; 3 *Id.*, 577; 1 *Hilton*, 49; 26 *N. Y.*, 420.)

If this be so—and even Judge Woodruff concedes it so in *Churchill v. Marsh* (*supra*)—then it would seem that the defect was merely an irregularity and did not render the process null and void. By the Revised Statutes, the court in which any action is pending has power, at any time before judgment, to amend any process, either in form or substance, for the furtherance of justice, on such terms as may be just. (3 *Rev. Stat.*, 5 *ed.*, 721, §1.) And section 173 of the Code provides that any court may, before or after judgment, amend any process or proceeding, by striking out the name of a party, or by correcting a mistake in any other respect. It has been repeatedly held that the marine and other courts of inferior jurisdiction have the same general power to allow amendments that courts of record possess (*Cooper v. Kinney*, 2 *Hilt.*, 12; *Perry v. Lyman*, 22 *Barb.*, 139; *Bruce v. Benson*, 10 *Wend.*, 213; *Ageda v. Faulberg*, 3 *E. D. Smith*, 178; *Near v. Van Alstyne*, 14 *Wend.*, 230; *Fulton v. Heaton*, 1 *Barb.* 552.) If, therefore, this had been *mesne* process, or if the amendment had been allowed in any pleading or proceeding, after the court had acquired jurisdiction, the power of the marine court to order the amendment could not be questioned. But this attachment was original process, by the service of which the court was to obtain jurisdiction of the person of the defendants; and as inferior courts must acquire their jurisdiction strictly in the manner prescribed by statute, I have had grave doubts as to the power of the court to amend it. But on the other hand, it may be said, that as the language of both the Revised Statutes and of the Code, declaring that “any process, &c.,” may be amended, is broad enough to cover this case, and as the defect arose through the omission, neglect or mistake of the clerk of the court, the plaintiff ought not to suffer. (*Neal v. Berryhill*, 4 *How. Pr.*, 16.) It is also to be remarked, that the act requiring the marine court to affix a seal to its process, was passed many years before either the Revised Statutes or the Code was passed; and it must be assumed that the law-makers knew of its existence when the latter acts were passed, and that they passed them with reference to that as well as any other law applicable to

that court. Again, of late years the policy of the legislature and the tendency of the courts seem to have been in favor of simplifying the practice in legal proceedings as much as possible, and of disregarding, more and more, technicalities and matters of form, and especially so where it may be necessary for the furtherance of justice.

To illustrate this, it is only necessary to refer to the act of 1847, by which the seal of process of courts of record may be dispensed with, the extensive provisions of the Revised Statutes and of the Code in regard to amendments, and the leaning of the court of last resort in favor of a liberal construction in proceedings by attachment, even upon questions of jurisdiction.

Then, too, it has been expressly held that original process may be amended as well as any other. (*Bartholomew v. Chautauque Bank*, 19 Wend., 99; and see *Near v. Van Alstyne*, 14 Wend., 230; *Weir v. Slocum*, 3 How. Pr., 397; *Neal v. Berryhill*, 4 Id., 16; *People v. Steuben*, 5 Wend., 103.)

In *Churchill v. Marsh* (*supra*), the question of power of the marine court to amend the process by affixing the seal, was neither discussed or decided. It is true, Judge Woodruff intimates that the omission of the seal rendered the process void. But, as we have already seen, the better view would seem to be that it was merely an irregularity, and at all events it will be safe to treat it as such, rather than as a nullity. (26 N. Y., 420.) We should also bear in mind, that in the rendition of that decision, one judge dissented; and although I do not feel disposed to question the correctness of the decision in that case, still I am inclined to think it went quite far enough, and should not be extended.

The cases of *Hallett v. Richters*, 13 How. Pr. 43, and *Kendall v. Washburn*, 14 Id. 380, are clearly distinguishable from the one under discussion.

In both of these cases the summons was served by publication; and it was held that the statute providing for substituted service being new, must be strictly complied with, or the court will not acquire jurisdiction; and that any defect or error in the proceedings, tending to confer jurisdiction, could not be cured by an amendment. Now the object of serving the summons on the defendant is to apprise him of the fact that an action has been commenced against him. In certain cases, where the defendant cannot be found, the statute allows the service to be made by publica-

tion. Surely, in such a case, the statute ought to be strictly pursued, as the defendant is clearly entitled to the benefit of all the means and methods which the law provides for informing him of the commencement of the action, *before* and not after judgment. And of course, if the statute is not complied with, the defendant has not, in contemplation of law, been served with the summons, and the court has not acquired jurisdiction of his person. So, too, if in a justice's court an action is commenced by attachment, and the affidavits upon which it is granted are insufficient to confer jurisdiction of the subject matter on the court, I am of opinion that the defect would not be supplied either by an amendment, or the introduction of additional affidavits.

But the case at bar is entirely different. Here the marine court obtained jurisdiction of the subject-matter by the affidavits, and all that was required to authorize it to proceed legally was to obtain jurisdiction of the persons of the defendants. That was accomplished by the personal service of the attachment. That, it seems to me was the principal and essential act necessary to confer jurisdiction. The objection that the attachment had no seal was, after all, only a technical one. One of the main if not the main object, I take it, of having a seal affixed at all, is to assure the defendant that the process was in reality issued by the court.

This was practically accomplished when, on the return day, the court, in presence of defendants' counsel ordered the process to be amended by having the seal affixed.

On the whole I am of the opinion that the marine court had the power to order the amendment in question.

With respect to the third and last point, it would seem that no objection was made to the sufficiency of the sheriff's return, either before the justice, on the return day of the attachment, or when the case was before the general term of the marine court, on appeal, but the question was first raised at the general term of this court.

Now, as a rule, a party cannot, on appeal, raise a point which was not raised in the court below, nor insist on an objection not taken there, and rely upon it for a reversal of the judgment in the court of review. (*Duffy v. Thompson*, 4 E. D. ²*Smith*, 178; *Millard v. Bridge*, 4 Barb., 361; *Merritt v. Thompson*, 1 Hilton, 650; *Id.*, 161; 5 N. Y., 492.) But as the point may be considered as affecting the jurisdiction of the court below, and as a ques-

tion of that kind can probably be raised at any time, I will briefly consider it.

This attachment was issued under the act to abolish imprisonment for debt. (*Laws of 1831, ch. 300, § 34.*) By section 36 it is provided that every attachment issued by virtue of that act shall be served in the manner provided by Article II, title 4, ch. 2, part 3 of the Revised Statutes, except that if the defendant can be found in the county, the copy of such attachment and inventory shall be served on him personally, instead of being left, as in said article provided; and the officer is also required to state specifically in his return whether such copy was or was not served on the defendant personally.

Now, there is nothing in the article of the Revised Statutes referred to, setting forth specifically what the return of the officer is to contain. But by section 29 he is required to execute the attachment at least six days before the return day, and immediately leave a copy of the attachment and inventory, certified by him at the last place of residence of the defendant, &c.; and by section 33 he is required to make a return thereof at a day therein named, with all his proceedings thereon, in writing, subscribed by him.

In his return the sheriff certifies, that by virtue of the attachment he did, on March 23, 1869, attach the property mentioned in an inventory annexed to the return; and further, that he served a copy of said attachment, and of the inventory, duly certified by him, on Felix J. Rosenberg, one of the defendants, personally.

The officer has, therefore, fully complied with the act of 1831, in that he has set forth in the return that a copy of the attachment and of the inventory was served on the defendant personally.

It also appears from the return, that in accordance with the provisions of the Revised Statutes he executed the attachment six days before the return day mentioned therein.

The only other duty the Revised Statutes imposed on the sheriff was, that he should serve the copy of the attachment and of the inventory (which by the act of 1831 was to be served on the defendant personally, if he could be found in the county) *immediately*. The sheriff returns, that he executed the attachment on a certain day; and further, that he served the defendant personally with a copy of the attachment and of the inventory; and I think the fair and reasonable intendment is, that he complied with the

statute, and that the service was made on March 23, when the attachment was executed. As we have already seen, the court of appeals has held, that a liberal indulgence should be extended to these proceedings, even upon questions of jurisdiction, as they would otherwise be rendered a snare rather than a beneficial remedy. In my opinion, therefore, the return was a substantial compliance with the statute, and sufficient, under the decisions, to confer jurisdiction on the court. (*Bascom v. Smith*, 31 *N. Y.*, 595; *Rosenfield v. Howard*, 15 *Barb.*, 546; *Johnson v. Moss*, 20 *Wend.*, 145; *Reno v. Pinder*, 20 *N. Y.*, 298; *Van Alstyne v. Crane*, 11 *N. Y.* [1 *Kern.*], 331.) And more especially as defendants, on the return day of the attachment, made no objection to the sheriff's return, but relied solely on other grounds to have the same dismissed. But even if the return was insufficient, I am inclined to think that under the provisions of the Revised Statutes and Code, relative to amendments, which, as we have seen, apply to the marine court, that court had the power to order the return of the sheriff to be amended, as was done in this case. (3 *Rev. Stat.*, 5 *ed.*, 721, §§ 1, 4, 5; *Code*, § 173; *Perry v. Tynen*, 22 *Barb.*, 137. And see opinion of Judge WOODRUFF, in *Churchill v. Marsh*, 4 *E. D. Smith*, 369.)

The court may permit an amendment, notwithstanding the defendant does not appear in the suit. (*Perry v. Tynen*, 22 *Barb.*, 137.)

And although an appeal has been taken, the power of amendment is confined to the court in which the action originated, and when amended there, the return will, on motion, be conformed to it in the appellate court. (*Gould v. Glass*, 19 *Barb.*, 186; *Luyster v. Sniffin*, 3 *How. Pr.*, 250; *Rew v. Barker*, 2 *Cow.*, 408.)

The judgment of the court below should be affirmed.

DALY, F. J., and VAN BRUNT, J., concurred.

SUPREME COURT.

FIELD v. M'VICKAR.

(9 John., 130. Decided 1812.)

Where an attachment against a concealed debtor is issued by a justice of the peace, and proceedings are regular, the justice cannot supersede the attachment, but must, on the return thereof, proceed to hear the cause, as on any other process.

* * * * *

IN ERROR, on *certiorari*, from a justice's court, M'Vickar sued out an attachment before the justice, against Field of Coxsackie, in the county of Greene, as a debtor concealed within the county, with intent to defraud his creditors, and to avoid process, &c. The attachment was regularly issued. On its return, both parties appeared, and Field pleaded in abatement, that before and at the time of issuing the attachment, he resided in Coxsackie, and had not departed, nor was he about to depart, from the county, nor did he conceal himself within the same, with intent to defraud his creditors, &c., or to avoid process, &c.

The plaintiff demurred to the plea, which was overruled by the justice, and Field then left the county without making any further defence. The plaintiff having proved his demand, the justice gave judgment.

* * * *

It was objected, 1. That the pleas in abatement were sufficient;

* * * *

Per Curiam. The first objection cannot prevail. If the proceedings on the attachment were regular, which is not questioned in this case, the justice had no power to supersede the attachment, but must, on the return thereof, proceed to hear the cause, as on any other process.

* * * *

SUPREME COURT.

FULTON v. HEATON.

(1 Barb., 552. Decided 1847.)

Where a creditor applied to a justice of the peace for an attachment against his debtor, and made an affidavit, which stated, that the debtor was indebted to him in the sum of \$16, arising on contract, over and above all discounts; that the debtor had told him that he was going to leave the county, and go to Canada, and, as the creditor believed, with an intent to defraud his creditors, and that he was about to take with him all his property; *Held*, that the affidavit was sufficient to authorize the issuing of an attachment.

An affidavit is sufficient to authorize an attachment, although the creditor merely swears to his belief as to the intent of the debtor to defraud his creditors, if he states positively the facts and circumstances on which such belief is founded.

Although an attachment is founded on a defective affidavit, if it is regular and legal on its face, and apparently within the jurisdiction of the justice, it will be a complete justification to the officer who executes it.

If the objection, that a joint plea of justification, in which an officer and a co-defendant united in a justice's court, failed as to the officer, in consequence of its having failed as a defence as to the co-defendant, was not taken before the justice, it cannot be taken on *certiorari*.

Justices' courts possess the same powers, as to amendments, as courts of record. Justices are required to allow amendments, liberally in all cases where the rights and interests of the adverse party will not thereby be put in jeopardy.

ERROR to the St. Lawrence common pleas. Heaton declared before the justice, against Fulton and one Whitney, in trespass, for taking and carrying away certain clothing, &c. The defendants pleaded the general issue, and a justification under an attachment, issued by Cummings, a justice of the peace, against Heaton, in favor of Fulton. Heaton proved that in September, 1845, Fulton and Whitney took a coat, &c., of Heaton. Whitney told Heaton he had an attachment against him. Cummings, the justice, produced his docket and papers to be read in evidence, and produced an affidavit of Fulton, entitled St. Lawrence county, which stated, "that Heaton, of Lisbon, in said county, was indebted to him in the sum of sixteen dollars, arising on contract, over and above all discounts; that he had often demanded the pay of Heaton, and he had refused to pay said demand, and Heaton told him, and one Northrup, that he was going to leave the county and go to Canada, and that he, Fulton, believed, with an intent to

defraud his creditors, and was about to take with him all the property and effects he had." This affidavit was objected to by Heaton, as insufficient to justify the issuing of an attachment ; and the justice sustained the objection, and rejected the attachment and proceedings founded thereon, as evidence, on account of the insufficiency of the affidavit, notwithstanding Fulton and Whitney offered to read them in evidence, with the docket of the justice, as a full justification of the trespass. The justice rendered a judgment against both Fulton and Whitney. The common pleas, on *certiorari*, affirmed the judgment of the justice, as to Fulton, but reversed it, as to Whitney.

T. V. Russell, for the plaintiff in error.

Geo. C. Conant, for the defendant in error.

By the Court, PAIGE, J. It is contended on the part of the defendant in error, that the defence offered by the defendants before the Justice, under the attachment issued by Cummings, was properly excluded, upon the ground of the insufficiency of the affidavit on which the attachment was issued. This attachment was issued, under the provisions of the revised statutes. (2 *R. S.* 230, §§ 26, 28, *as amended by the law of 1831, p. 404. Id.* §§ 34, 35, *amended by the act of 1842, ch. 107, p. 74.*) Section 26 of 2 *R. S.* 230, authorizes an attachment to be issued, where it shall satisfactorily appear to the justice, that the debtor has departed, or is about to depart, from the county where he last resided, with intent to defraud his creditors, &c. And section 34 of the act of 1831, authorizes an attachment for the recovery of any debt or damage arising upon contract, &c., where the defendant is about to remove from the county any of his property, with intent to defraud his creditors, &c. ; whether the defendant be a resident of the State or not. And section 35 of the act of 1831, provides, that the plaintiff must, by his own affidavit, or that of some other person, prove, to the satisfaction of the justice, the facts and circumstances to entitle him to the attachment ; and that he has such a claim as is specified in section 34 of the same act, against the defendant, over and above all discounts which the defendant may

have against him, specifying as nearly as may be, the amount of the claim, &c.

In this case, the affidavit stated, that the debt arose on contract, and specified the amount due over and above all discounts. It then stated that the plaintiff had often demanded payment of the debt, of Heaton the debtor, and that Heaton refused to pay the same; that Heaton, who is described as of Lisbon in said county (St. Lawrence), had told him and one Northrup, that he was going to leave the county and go to Canada, and, as the plaintiff believed, with intent to defraud his creditors, and was about to take with him all the property he had. This affidavit states substantially the fact required in section 26 (2 *R. S.* 230), viz. that Heaton was about to depart from the county where he last resided. This fact, Fulton states positively, on the declaration of Heaton the debtor; and then Fulton adds, on his belief, that Heaton was about to leave the county, with intent to defraud his creditors. This affidavit, in my judgment, is sufficient. It states positively all the facts and circumstances necessary to be stated to entitle Fulton to an attachment, except as to the debtor's intent to defraud his creditors; and Fulton swears to such intent on his belief; and he sets forth positively the facts and circumstances upon which his belief is founded.

An affidavit is good, although the applicant swears only to his belief, as to the intent to defraud; provided he sets forth on his positive oath, the facts and circumstances on which such belief is founded. (*Johnson v. Moss*, 20 *Wend.*, 145. *Smith v. Weed*, *Id.* 184. *Smith v. Luce*, 14 *Id.* 237.)

If the affidavit was sufficient, the justice committed an error in rejecting evidence of the attachment in justification of the trespass complained of; and the judgment of the justice should have been reversed by the common pleas, as to both defendants. But if the affidavit was defective, the attachment, if regular and legal on its face (and there was nothing in the case to show it was not), should nevertheless have been received in evidence, as a justification of the defendant Whitney, the officer who executed it. It is now a well established principle, that a process regular on its face, and apparently within the jurisdiction of the court or officer who issued it, is a complete justification to the officer who executed it. And such officer is protected, although the court or officer had no juris-

diction in fact, if the defect does not appear on the face of the process. (2 *Denio*, 86. 5 *Wend.*, 170. 5 *Hill*, 440. 24 *Wend.*, 485. 16 *Id.* 514, 562.) And this principle applies to process issuing from a court or officer of limited jurisdiction, as well as to process issuing from a court of general jurisdiction. (5 *Wend.*, 170.) And if the justification failed as to Fulton, I think the justification did not (as is contended by the counsel of the defendant in error), fail as to Whitney, in consequence of his uniting with Fulton, in a joint plea of justification.

This objection to the attachment being a justification to Whitney, was not taken before the justice. Not being taken there, it was waived, and could not be taken on the *certiorari*, in the common pleas, and cannot now be taken here. If the objection had been taken before the justice, the justice might have allowed Whitney to amend by putting in a separate justification. This the justice had the power to do. Justices' courts possess the same powers, as respects amendments, as courts of record. (10 *Wend.*, 214, 215. 2 *R. S.* 225, § 1. *Id.* 519, § 1. *Id.* 521, § 10, 3d ed.) Justices are required to allow amendments liberally, in all cases, where the rights and interests of the adverse parties, will not, thereby, be put in jeopardy. (12 *Wend.*, 150. 15 *Id.* 557.)

Misjoinder of causes of action, in a declaration, in a justice's court, if not objected to before the justice, cannot be taken advantage of, on *certiorari*. (12 *John.*, 347. 3 *Hill*, 609. 1 *Id.* 62.) Previous to the case of *Lovett v. Pell*, in the court of errors (22 *Wend.*, 369), a misjoinder of counts in a court of record, was fatal on a writ of error, as well as on demurrer. (16 *John.*, 146. 1 *Chit. Pl.* 205. 19 *Wend.*, 546.) The case of *Lovett v. Pell*, Chief Justice Bronson says, in *Whitney v. Crim* (1 *Hill*, 62), he is unwilling to follow as a precedent.

The decision in *Lovett v. Pell*, was founded on the opinion of Senator Verplank, and in opposition to the opinion of Chancellor Walworth. Senator Verplank held, in *Lovett v. Pell*, that a misjoinder of counts was cured, after verdict, by the provisions of the revised statutes, in relation to the amendment of pleadings and proceedings. (2 *R. S.* 520, § 7, sub. 5, 3d ed.) He held that the term mispleading, which is cured after verdict, used in the revised statutes, included within its sense, a misjoinder of counts.

If a misjoinder of counts in a justice's court, cannot be taken

advantage of on *certiorari*, on the ground that it is a mere formal and technical question of pleading, or that it is mere mispleading, then the objection (which involves a question of altogether like character), to the defence of an officer under a joint justification, where it failed as to his co-defendant, not having been taken before the justice, cannot be taken on *certiorari*, or on error; or it may, like a case of misjoinder of counts, under the authority of *Lovett v. Pell*, be regarded as a *mispleading*, and therefore cured, by the provisions of the revised statutes in relation to amendments. Much greater latitude is allowed in pleadings before justices, than in courts of record, especially in cases where the objection is not taken at the proper time. (1 *Hill*, 62.) In any view of the question, therefore, the objection, that the defence of the defendant Whitney failed because the defence of his co-defendant failed, could not be taken in the common pleas. And the decision of that court was, therefore, correct, in reversing the justice's judgment as to him.

If then the judgment of the justice was properly reversed by the common pleas, as to the defendant Whitney, it necessarily follows, as the judgment was entire, as to both defendants, that it should have been reversed in toto. Where a judgment is entire against several defendants, whether rendered in an action for tort or on contract, it cannot be reversed as to one defendant, and affirmed as to another. (*Sheldon v. Quinlan*, 5 *Hill*, 441. *Cruikshanks v. Gardner*, 2 *Hill*, 333. 12 *John.*, 434. 14 *Id.* 417.)

As the judgment of the justice was properly reversed by the common pleas, as to the defendant Whitney, it should have been reversed as to Fulton also. The original judgment of the justice, and the judgment of affirmance of the common pleas, must, therefore, both be reversed.

COURT OF COMMON PLEAS.

WATES v. WILLETT.

(2 *Hilt.*, 212. *Decided* 1858.)

Lewis B. Reed, jr., and *John Sessions*, for the appellant.

A. J. Vanderpoel (*Brown, Hall & Vanderpoel*), for the respondent.

By the Court, HILTON, J. The material question to be here determined is, whether the attachment issued out of the Marine Court was duly served by the plaintiff, as constable, on the 19th of May, 1856? because, if such was the case, it is conceded that the proceeds of the property attached, and applied to the payment of executions delivered to the defendant, as sheriff, after that day and prior to the 26th of May, were more than sufficient to pay the amount of the judgment recovered in the Marine Court on the return of the attachment. The return of the constable is in the following words, indorsed on the writ:

“By virtue of the within attachment I did, on the 19th day of May, 1856, attach and take into my custody the goods and chattels of the defendant within named, and an inventory of which the annexed is a copy; and immediately on the same day, *because I could not find the defendant*, I left a copy of said attachment and inventory with a person in whose possession I found the goods and chattels of the defendant, at No. 252 Washington street in the city of New York.”

The 36th section of the Non-imprisonment Act (*Laws of* 1831, 396; 2 *R. S.* [4th ed.] p. 461, § 213; also p. 432, § 29), directs that the attachment shall be executed by the constable to whom it is delivered, by attaching and taking into his custody such of the goods and chattels of the defendant as shall be sufficient to satisfy the plaintiff's demand, immediately making an inventory of the property seized, and leaving a copy of the attachment and of the inventory, certified by him, at *the last place of residence* of the defendant; and if the defendant can be found in the county, such

copy shall be served upon him personally, instead of leaving it at his last place of residence. But if the defendant has *no place of residence in the county* where the goods and chattels are attached, and cannot be found therein, such copy and inventory shall be left with the person in whose possession the goods and chattels shall be found.

It appears that the attachment under which the plaintiff claims, was issued against the property of one James Crawford upon the application of one James L. Butler, a creditor, and was founded on the affidavit of Butler and others tending to show that Crawford had made a colorable sale of his property contained in his store and place of business No. 252 Washington street, with intent to defraud his creditors. That after diligent search for him by Butler for 48 hours, by sending and going to his residence No. 54 First street in this city, he had been unable to find him; and Butler's belief was that Crawford kept himself concealed to avoid his creditors and to avoid service of process. This was sworn to two days prior to the issuing of the attachment.

The facts thus stated rendered the duty of the plaintiff, as constable, in executing the attachment, very plain and simple. After taking the goods and chattels into his possession, and making an inventory thereof, he was to make diligent inquiry for the defendant Crawford, and if he *could not be found* in the county, then leave a certified copy of the inventory and attachment at *his place of residence* No. 54 First street, and in the official return of the proceedings under the attachment he should have specified the manner in which it was executed, and, in addition, specifically stated whether such copy was or was not personally served on the defendant named in it. *Laws of 1831, p. 396, § 36.*

Now it is quite clear from the plaintiff's return, that the attachment was not served in the manner required by law, nor was the return sufficient to authorize Butler to proceed to trial before the justice upon the return day of the attachment. *Id.*, § 38; *Cook v. McDoel*, 3 *Denio*, 317. It is true, the justice acquired jurisdiction to proceed to trial and judgment on that day by the defendant Crawford voluntarily appearing, but that act could not make an incomplete service of the attachment perfect in law as against prior executions, already levied by the defendant in this action, in favor of other creditors. *Horton v. Hendershot*, 1 *Hill*, 118.

Although the judgment was valid, yet the plaintiff, as constable, acquired no other right to the property than such as a legal service of the attachment would have given him (*Homan v. Brinkerhoff*, 1 *Denio*, 184; *Barnes v. Harris*, 4 *Comst.*, 374); and, as we have seen the attachment was not served in the manner required by the statute, he acquired no right to the possession of the property, nor any right of action respecting it. It is the *service* of the attachment which places goods taken under it in the custody of the law, and creates a valid lien, which a subsequent execution cannot remove. *Van Loan v. Kline*, 10 *John.*, 129.

SUPREME COURT.

TIFFT v. CULVER.

(3 *Hill*, 180. *Decided* 1842.)

Though a justice improperly adjourn a cause pending before him, yet if the parties appear at the adjourned day, and proceed to trial, they will be regarded as having waived the irregularity.

* * * * *

ERROR to the Rensselaer C. P. Tift sued Culver before a justice, and declared in trespass, for willfully overturning his wagon. After issue joined, the cause was adjourned, on the defendant's motion, to the 9th of May, which was Saturday, at 6 P. M. The parties appeared and the plaintiff then proved that one Casey, who was a material witness for the plaintiff, had been duly subpoenaed, and neglected to attend. The justice thereupon issued an attachment against Casey. This was about 9 o'clock in the evening. About 11 o'clock in the evening the plaintiff called and examined a witness. At half-past 11, the constable returned the attachment, and testified that he could not find Casey. The defendant thereupon asked the justice to dismiss the suit on the ground that the attachment had been issued three or four hours. Motion overruled. The plaintiff then requested another attachment; whereupon the justice, in consequence of the lateness of the hour on Saturday night, concluded that there could be no more proceedings in the cause that night, and at his own instance adjourned the

cause until the next Monday morning, at 9 o'clock, and issued another attachment for the absent witness. On the adjourned day both parties appeared, the constable brought in Casey on the attachment, and the trial proceeded. It was proved that the defendant in the night time laid hold of the plaintiff's wagon and overturned it. The wagon was broken in several places, and the witness estimated the necessary expense of repairs at \$3.37. The justice, as the return states, rendered judgment against the defendant "for \$3.37, together with treble damages, making in all \$5.89 for damages, and \$2.66 costs — whole judgment for damages and costs \$8.55." On certiorari, the C. P. reversed the judgment. The plaintiff sued out a writ of error.

Kellogg & Strong, for the plaintiff in error.

D. L. Seymour, for the defendant in error.

By the Court, BRONSON, J. It is not necessary to determine whether the justice was right in adjourning over from Saturday night until Monday morning. The irregularity, if there was one, was waived by the defendant, by appearing and proceeding with the trial on Monday. (*Durham v. Heyden*, 7 *John. R.*, 381; *Willoughby v. Carleton*, 9 *id.*, 136.) * * * *

* * * *

Ordered accordingly.

SUPREME COURT.

MATTISON v. BAUCUS.

(*Hill and Denio*, 321. *Decided* 1844.)

ERROR to the court of common pleas of the county of Rensselaer.

T. C. Ripley, for plaintiff in error.

J. Pierson, for defendant in error.

By the Court, BEARDSLEY, J. Mattison sued Baucus in the justice's court in trover, and recovered judgment, which was car-

ried to the court of common pleas by appeal. On the trial in the common pleas the plaintiff claimed to recover, on the ground that he had made a levy, as constable, on the property in question, by virtue of an execution in his hands against one Foster. Questions were made as to the legality of the execution and the levy, but these were ruled by the court in favor of the plaintiff, and it is not necessary to examine them here as the cause was finally disposed of on other grounds. The defendant justified the seizure of the property under an attachment issued in his favor by a justice of the peace, against Foster. The plaintiff objected that the attachment was void, but the court decided that it could not be attacked in this collateral way, and that it constituted a good defense to the action. To this the plaintiff excepted, and the questions to be decided are thus raised.

The principles which apply to the case are very familiar and hardly require to be supported by reference to authority. The plaintiff, a constable, had an execution against Foster, which he claimed to have levied on this property. He therefore set up the rights of an execution creditor of Foster, and as such, had an unquestionable right to attack his proceeding by attachment and show it to be void. This, indeed, may be done by any person against whom it becomes necessary to prove such proceedings as a defense; there is no exception to the rule.

The attachment issued in this case was a nullity and constituted no ground of defense to the defendant.

A justice of the peace may issue an attachment in certain cases, as is particularly specified in the Statute. Amongst other things the application for this process must be founded on a demand "amounting to one hundred dollars, or any less sum." (2 *R. S.* 230, § 27.) An affidavit must be made stating "the *sum* in which the debtor is indebted," which sum is also to be set forth in the attachment, and the constable is to be thereby commanded to attach so much property of the debtor as will be sufficient to satisfy such debt. (§§ 28, 30.) The sum mentioned in the affidavit upon which this attachment issued, and in the attachment, was one hundred and five dollars and eighty-seven cents, and the constable was commanded to attach property to satisfy that debt. This was wholly unauthorized; a justice has no power to issue an attachment for any sum exceeding one hundred dollars. If he

can do so for one hundred and five dollars, he can for five thousand.

The justice plainly transcended his jurisdiction, and the plaintiff in the attachment, who procured it to be issued and served, was a trespasser, and can not set it up as a justification against any person.

The judgment of the common pleas must be reversed.

SUPREME COURT.

WHEELER AND OTHERS v. MCFARLAND.

(10 *Wend.*, 318. *Decided* 1833.)

Where it is agreed that the *owners of a saw-mill* shall have a *lien* for their charges in sawing logs into boards, that the boards shall be removed a short distance from their premises, but that the lien shall continue until payment, and the boards are sawed and piled accordingly a short distance from the mill, the lien of the owners of the mill is as perfect as if the boards were in their mill-yard; the possession of the owner of the boards is their possession.

And when, under such circumstances, a sheriff, by virtue of an execution against the owner of the boards, *levied* upon the boards after being apprized of the *lien*, and advertised the *whole property*, and not merely the *right* of the defendant to the property *subject to the lien*, IT WAS HELD, that the parties entitled to the lien might sue out a *replevin*.

It seems that the *interest* of the defendant *subject to the lien* might have been *levied upon* and sold, without subjecting the officer to responsibility.

ERROR from the Washington common pleas. This was an action of *replevin* brought by the plaintiffs for a quantity of boards taken by one Eldridge, a deputy of the defendant, sheriff of the county of Washington, by virtue of an execution against one Vaughan.

S. Stevens, for the plaintiffs.

W. Hay, jun. & D. Russell, for the defendant.

<i>By the Court</i> , SAVAGE, Ch. J.	*	*	*	*
* * *	*	*	*	*

Was the action prematurely brought? The defendant contends that he had a right to all the interest of Vaughan in the property,

subject to the lien of the plaintiffs. It seems to me unnecessary in this case to discuss the general question whether a reversionary interest of one person in personal property may be sold by the sheriff while another person has the possessory interest; for it appears in the bill of exceptions that the whole value of the property levied on, was not equal to the plaintiff's claim for sawing against Vaughan, and which was a lien upon this property; Vaughan, therefore, cannot be said to have any interest in it. The defendant by his advertisement offered the whole property; he did not propose to sell subject to the plaintiff's claim, but in defiance of it. It has been decided in a variety of cases, that where a person is in possession of personal property, and has a right to that possession for a time certain, the interest of such possessor may be sold. Such is the case of a lessee or possibly a mortgagor in possession before forfeiture. 4 *Taunt.* 489. 7 *id.* 11. 2 *Cowen*, 543. 3 *Wend.*, 499. That the interest of Vaughan might have been sold subject to the plaintiff's lien, I am not disposed to deny. In the case of *Moore v. Hitchcock*, 4 *Wend.*, 292, the interest of the general owner of a brick kiln was sold subject to the lien of the brickmaker of \$1.75 per thousand for making them; and no question was raised as to the right of the defendant to the brick, he being the purchaser at sheriff's sale of the interest of the original owner. The facts in this case, however, do not present that question, nor was that the point raised in the court below; it was that the action was prematurely brought, that is, that a *mere levy* without a sale or removal of the goods was not sufficient to justify the bringing an action of replevin. All the cases in this court support the doctrine that replevin lies in all cases where trespass *de bonis asportatis* will lie. 7 *Johns. R.* 142. 20 *id.* 467. 3 *Wend.*, 281. And it has often been held that a levy, where it is not authorized by law, is a trespass; it is not necessary that there should be a removal of the property; any exercise of control over the property of another is a trespass. Where an officer levies on property and leaves it in possession of the defendant in the execution, the possession acquired by the levy is sufficient to sustain trespass or trover by the officer against a stranger. 6 *Johns. R.* 196. 2 *Saund.*, 47. After seizure under the execution, the goods are, in judgment of

law, in possession of the officer, and the person with whom they are left is his servant. In *Reynolds v. Shuler*, 5 Cowen, 323, a bailiff who distrained and sold the plaintiff's goods without removing them, was held guilty of a conversion. So a levy upon goods by virtue of an execution, though there be no removal of them, constitutes the officer a trespasser if the levy is not justified. 7 Cowen, 735. *Ingersoll v. Van Bokkelin*, 7 Cowen, 670, proves that he who has a lien upon goods, has such a special property in them as to support trover against any one who converts them by authority to the general owner; of course, the action would lie against the general owner himself. The same doctrine, as to the liability of any person assuming control over the property of another, is recognized and asserted in *Lewis v. Palmer*, 6 Wend., 368, where it was held that the act of selling a stack of hay, though it was not removed, was a trespass; and in *Philips v. Hall*, 8 Wend., 613, where it is said the levy by the sheriff and taking a receiptor changed the possession of the goods in contemplation of law. It seems clear, therefore, that the defendant had done enough to make himself liable in trespass, if the plaintiffs were the owners of the boards.

On the whole case, it satisfactorily appears that the plaintiffs, having a lien on the boards, had such a special property in them as to authorize an action to be brought by them; and that the defendant, by the levy, had, in contemplation of law, dispossessed the plaintiffs of their property and therefore the action of replevin was well brought.

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COURT OF APPEALS.

THE PEOPLE *ex rel.* POST *v.* RANSOM, Sheriff of Tioga.(2 *New-York Rep.*, 490. *Decided* 1849.)

* * * * *

A sheriff's return to an alternative mandamus, in order to justify the execution of a deed by him to another redeeming judgment creditor, need not state that the clerk's certificate to the copy of the docket of the creditor's judgment produced to him, was under seal.

This doctrine laid down in *ex parte Shumway* (4 *Denio*, 258), and *ex parte Bank of Monroe* (7 *Hill*, 177), that the *attorney in the judgment* cannot make the affidavit of the amount due for the purpose of acquiring the interest of the purchaser at a sheriff's sale, *questioned*.

* * * * *

Geo. Sidney Camp, for appellant.

B. D. Nowon, for respondents.

STRONG, J. * * * * *

* * * It is objected to the clerk's certificate, that it does not appear that it was under his seal of office, or that it was in the form required by the revised statutes. 2 *R. S.*, 403, § 59. Neither is a part of the description of the certificate contained in the act relative to executions against property, and it is not necessary that there should be any greater precision in a pleading than in the statute. If those formalities are requisite, and do not exist, the objection might be taken on the trial. It is not usual to state in a pleading that any writing to which it relates was executed with all the formalities which any statute, other than that under which the action is had, may require. That again is a matter of evidence. It is also objected that it does not appear that the attorney making the affidavit acted in that capacity on the application of the sheriff. I have some doubts, notwithstanding the decision of the supreme court in 4 *Denio*, 258, and 7 *Hill*, 177, whether the affidavit cannot be effectually made by the attorney in the suit on which the judgment was obtained. If not, it would seem to be unnecessary to enumerate distinctly, as the statute does, both attorney and agent, as the latter term would include an attorney whose agency should be confined to the single transaction of effecting the purchase.

But the same answer may be given to this objection as to those against the clerk's certificate. The description is as definite as it is in the act, and if the affidavit is defective in the particular alluded to, that would appear, and would avail the relator on the trial.

* * * * *

SUPREME COURT.

STERLING v. WELCOME.

(20 *Wend.*, 238. *Decided* 1838.)

Where property is taken under an attachment, the lien created thereby continues notwithstanding the giving of a bond by the debtor for its production until the issuing of an execution and a reasonable time thereafter to make a levy. If, however, in the mean time the property be removed by the debtor beyond the jurisdiction of the officer who issued the attachment, and it be there seized under another attachment, the lien is gone notwithstanding the issuing of an execution on the judgment under the first attachment.

THIS was an action submitted to the Hon. John Willard, one of the circuit judges, upon a case agreed upon by the parties. The judge decided that the plaintiff was not entitled to maintain his suit; whereupon the case was brought before the court, in the nature of a motion for a new trial.

G. B. Judd, for the plaintiff.

W. M. Allen, for the defendant.

By the Court, NELSON, Ch. J. The case of *Van Loan v. Kline*, 10 *Johns. R.* 129, is in point to show that the bond given by a defendant in an attachment conditioned that the goods and chattels seized, shall be produced to satisfy the execution thereafter to be issued, does not operate to discharge them from the lien under it, but that notwithstanding the bond they continue in the custody of the law. The attachment in *Van Loan v. Kline*, was issued under the act of 1808, but the provision in respect to the bond is the same as that now in force, 2 *R. S.* 231, § 32. The exposition

of the provision given by the case referred to, is full and satisfactory, and need not be repeated. The lien continues until after judgment and execution regularly obtained with the view to secure the application of the property to the discharge of the debt; it ceases on the execution being issued, as then the property is held by other process. But it is insisted by the counsel for the defendant, and I think correctly, that though the property be in the custody of the law under the attachment, and so continues down to the time when the execution actually is, or may be, issued, still it cannot be said to be held under the process of execution until a *levy* by virtue thereof be regularly made. This undoubtedly must be so, unless we say that the seizure under the attachment shall inure to the benefit of the execution; and this we cannot say consistently with the security of the judgment creditor, unless we go further and hold that the *bond*, shall also inure in like manner, or if the property has been taken into the custody of the attaching officer, that he may continue to keep it until the day of sale, although he may not be the person to whom the execution is delivered; for should we say that a *levy* under the execution is not essential to hold the property, it need not be removed or disturbed until the day of sale, and that might be indefinitely postponed. The better construction, I think is, that a *levy* must be made in the usual way, as if no connection existed between the process of attachment and the process of execution, and then the responsibilities under each process will be properly distributed both in respect to officers and sureties. This seems to be the view of the Court of Massachusetts under the attachment law of that State, which, as regards this question, is essentially like ours. 9 *Mass. R.* 257; 7 *id.* 505; 15 *id.* 225; 16 *id.* 296; 4 *id.* 498; 16 *Pick.* 556.

If, as I am inclined to think, a *levy* be necessary, then it is clear that this action cannot be maintained, because a *levy* under the execution held by the plaintiff could not be made *beyond the jurisdiction* of the justice who issued that process. This conclusion is not subject to the imputation that it violates the rule which forbids a *levy* upon property already in the custody of the law, because the *lien* of the attachment ceases on the issuing of the execution and the elapsing of a reasonable time thereafter to make a *levy*. 10 *Johns. R.* 131, and the cases cited above.

New trial denied.

SUPREME COURT.

MERRITT v. READ AND PEARSALL.

(5 *Denio*, 352. *Decided* 1848.)

A magistrate who issues void process is liable for the injury inflicted upon the party against whom it issued, only where it is executed according to its mandate.

Accordingly, where a justice of the peace issued an attachment without jurisdiction, directed, according to the statute, to any constable of the county, but the party who sued it out placed it in the hands of a *deputy sheriff*, with direction to execute it, which he accordingly did; *held*, in trespass by the party against whom it issued, that the justice was not liable.

TRESPASS for taking a horse, tried at the Westchester circuit, in November, 1844, before Ruggles, late Ch. J.

The defendant Read as a justice of the peace, on the application of Pearsall, the other defendant, issued an attachment against the plaintiff, assuming to do it under the act to abolish imprisonment for debt, on the ground that the plaintiff had disposed of his property with intent to defraud his creditors; but he neglected to take any bond, and the affidavit was fatally defective. Pearsall, the plaintiff in the attachment, delivered it to Tyler, who was a *deputy sheriff* and not a constable, with directions to execute it. Tyler took the horse from the plaintiff but never made any return to the attachment. There was some evidence that Pearsall claimed title to the horse, by which it might be inferred that he took this method of getting it into his possession. It was never returned to the plaintiff. The attachment was produced and given in evidence by the plaintiff. It was directed "To any constable *or sheriff* of said county;" but Tyler swore that when he received it from Pearsall, the words "*or sheriff*" were not contained in it; but he declined to say when or by whom they were inserted. It was shown that the defendant Read had said that the attachment had been served by Tyler as a deputy sheriff, but he added that the direction to the sheriff was inserted after it had passed out of his, Read's, hands.

It does not appear that any question was made to the court; but the defendant's counsel insisted to the jury that Read was in no way a party to the trespass, the attachment not having been executed by a constable to whom, alone, it was addressed. Verdict for the

plaintiff against both defendants. A motion was made for a new trial on a case.

M. T. Reynolds, for the defendants.

J. W. Tompkins, for the plaintiff.

By the Court, McKISOCK, J. There was no question on the evidence but that the plaintiff owned the horse. He purchased him of the defendant Pearsall, and there was no ground for saying that the title did not pass, because a payment had not been made as had been agreed.

This brings us to the only question worthy of consideration in the case. Can the verdict against Read be sustained? He neglected to take the bond of the plaintiff in the attachment as prescribed by the statute. The preliminary affidavit was also defective in not stating the facts and circumstances to show that Merritt was about to dispose of his property to defraud his creditors. For each of these causes he failed to acquire jurisdiction in the case, and the attachment was therefore void, and he and the plaintiff would have been trespassers for taking the defendant's property had it been taken according to the directions of the precept. (1 *Cowen's Tr.*, 535; *Smith v. Luce*, 14 *Wend.*, 237.) The reason of the liability of the justice is, that having issued process without authority of law, he has given a personal direction or request to do the acts which the process directs to be done. This responsibility must therefore be limited to such acts as are done according to the mandate of the instrument. In determining whether the acts which were done were in pursuance of the process, the same considerations are applicable, which would have belonged to the case, had the process been entirely legal. Thus, it will be considered a command to attach, and not to sell property; to attach the property of the defendant and not that of another. It is a direction to the particular officer or class of officers named, and not to a different one; and if a person not mentioned or referred to in it, undertakes to execute it, he is considered not only as having volunteered but as having intruded to act officiously, without the consent of the magistrate and against his express direction, as contained in the process. The doings of one so volunteering are by no legal

intendment the acts of the magistrate, as they were not performed by his assent, counsel or procurement. The counsel for the plaintiff was therefore mistaken, when he argued that the issuing of the attachment was the remote cause of the trespass, and that the defendant Read was liable, whoever executed the illegal mandate.

The defendant's counsel insists that the verdict is against evidence, as there was no proof either in the attachment or otherwise to charge Read with its execution. The attachment was executed by a deputy sheriff and not by a constable, and when produced on the trial it was directed "to any constable or the sheriff of Westchester county;" yet it was shown beyond all doubt, the words "or sheriff" were not in it when issued or delivered to the defendant, Pearsall, plaintiff in the attachment, nor till after the time it was delivered to him by the deputy sheriff. Neither is there a shadow of evidence that Read had any connection directly or indirectly with their insertion, or with the execution of the process by the deputy, or that he ever received it officially on its return after its execution. In fact, it never was returned by the officer. Neither was there any evidence when, or by whom, the words "or sheriff" were inserted. It is however argued, that Read acquiesced in and adopted the act of the deputy. This is a misapprehension. The whole of the evidence on that point is, that some time after the affair, he said that the deputy had executed the process and that it had been altered by inserting the words "or sheriff" after it was issued. That was neither an acquiescence in, nor an adoption of, the act. It was simply mentioning the then well known facts, that the deputy had served the paper, and that it had been directed to the sheriff, as well as to any constable in the county of Westchester. I am totally at a loss to perceive on what ground the jury found Read guilty, unless they were under the impression that having issued a void process he was responsible for whatever might be done upon pretence of it by any person whatever; a proposition totally untenable, as has already been shown. The verdict against Read is manifestly contrary to evidence, and there must be a new trial on that account.

COURT OF COMMON PLEAS.

PETRIE v. FITZGERALD.

(1 *Daly*, 401. *Decided* 1864.)

APPEAL by the defendant, from an order made at Special Term, denying a motion to set aside an order of arrest.

J. Solis Ritterband, and *S. B. H. Judah*, for appellant.

George G. Barrett, for respondent.

By the Court, BRADY, J. The defendant in this case was arrested on the 3d day of November, 1863, which was a day for a general election. Claiming exemption as an elector, he caused to be served a notice of motion for his discharge from arrest and to declare the service of the process upon him invalid. The plaintiff's counsel being desirous of ascertaining from an examination of the defendant whether he was a citizen, and whether or not there were any circumstances which rendered it impossible that he could legally exercise his franchise, insisted upon the defendant's attendance on some day on which the motion might be heard, and with a view to enforcing this design, obtained from the judge at Special Term an order requiring the defendant's attendance, and also served a subpoena upon him. The defendant was temporarily absent at this time and sojourning in the State of New Jersey, whither he went after his arrest, and after the service of the order and subpoena was made upon him in that State. He attended however upon the last day to which his motion had been adjourned, and was informally examined by the plaintiff's counsel, who, being satisfied from the examination that neither the arrest nor the service of the process was legal, entered an order declaratory thereof, and paid to the defendant's attorney the costs granted by the Court. The defendant after this was done left the Court room, and before he had had reasonable time to leave the City Hall was arrested again in this action.

The papers designed for the first action are not before us. Whether it was shown by them conclusively that the defendant was an elector or not, does not appear. It would seem, however,

from his statement when examined by the plaintiff's counsel, that he was not a registered voter, and not a citizen. He says that he did not have his name registered because "he had never gone through the form of being naturalized in any office." If he were native born, he did not require to be naturalized, and if foreign born, naturalization was indispensable to make him an elector. His statement that he was an elector was the declaration of a legal conclusion, which upon the facts disclosed, so far as they appear on the papers before us, could not be sustained. The plaintiff's counsel, however, seems to have been satisfied that the defendant was exempt, and discontinued his proceedings. The first question which presents itself on the facts detailed, is whether the second arrest was lawful, and its consideration involves two propositions.

1. Could the defendant be arrested again in this suit on the same process?

2. Was he privileged from arrest at the time the arrest was made?

There can be no well-founded doubt of the right to arrest the defendant again. The privilege or exemption from arrest expired with the election day, and the parties are put upon the same legal relation toward each other as if the arrest had not been made. (*Peck v. Hozier*, 14 *John.*, 346; *Sperry v. Willard*, 1 *Wend.*, 32; *Humphrey v. Cumming*, 5 *Wend.*, 90.)

This right does not seem to be disputed by the defendant. He claims exemption as a witness and suitor. The privilege from arrest on the day of an election was created with reference to the elective franchise which, as a part of our system of government should be protected, and its free exercise secured for the public good. I am aware that there had not been an arrest upon an election day in any of the cases which are cited, but so far as the immediate question under consideration is concerned there is no difference in principle between the privilege of a person as a witness suitor, or elector. While the privilege continues, the person is sacred but not longer. The right to arrest the defendant existing for these reasons, was it lawfully exercised? This brings us to the second question.

The counsel for the respective parties to this controversy have discussed this subject more particularly in reference to the privilege of the defendant as a witness, in which character, he, as he

alleges, attended this Court on the day of his second arrest. It is not necessary to consider on this appeal, that aspect of the question. If it were, it could be demonstrated that the defendant was not bound to attend as a witness on behalf of the plaintiff, and that his appearance was voluntary in that character. He was served with a subpoena out of the jurisdiction of this court and of this State. He had a right however, to attend this Court, on the day on which the motion for a discharge on his behalf was to have been made. It was an abstract right, in the exercise of which he enjoyed a perfect immunity from arrest—the right of a suitor which has in no respect been diminished in this State by either written or unwritten law. See Graham's Pr. (2 ed.), p. 129 where the cases on this subject are collected. His right was that of going to, remaining at, and returning from, this Court without interference with his liberty—*eundo, morando, redeundo*. And that right, if it could be enlarged, was so enlarged by the order of this court, requiring him to attend, and in reference to the proceeding which he had set in motion, and about which this Court deemed further information from him necessary. He was, therefore, as a suitor, privileged from arrest at the time of his seizure, and would have been entitled to his discharge on application. If he had been in fact privileged as a witness, his discharge could have been made by the sheriff or the sheriff could have desisted from making the arrest, on his making the affidavit prescribed by the statute, 3 Rev. Stat. (5 ed.), p. 685 § 69, but the evidence furnished shows, I think, that he did not claim his discharge on that ground from that officer. In the view which I take of this case, however, that is not material. My conclusions are for these reasons, that the right to arrest the defendant was given by law, but that it was employed at a time when he was secured from it temporarily by his privilege, and it follows that the motion made on his behalf to be discharged, was improperly denied, unless he waived the right to be discharged by his own acts in reference to this action. The acts arrayed against him are

1. Giving an undertaking upon his arrest, and
2. When the sureties to that undertaking were excepted to, giving notice of justification.

The exemption from arrest is a personal privilege which can be waived, and the waiver is complete, when the party or witness fails

to claim it at once, and does some act in the cause in reference to his appearance on defence. (*Hardenbrook's Case*, 8 *Abb. Pr.* 416; *Stewart v. Howard*, 15 *Barb.*, 26; *Pixley v. Winchell*, 7 *Cow.*, 366; *Dix v. Palmer*, 5 *How. Pr. R.*, 233; *Geyer v. Irwin*, 4 *Dall.*, 107; *Cole v. McClellan*, 4 *Hill*, 59; *Brown v. Getchell*, 11 *Mason*, 11, 14.)

Thus, in *Geyer v. Irwin*, the defendant was a member of the general assembly. On his arrest he did not claim his exemption, and when the cause against him was called for trial, he confessed judgment. The Court refused to discharge him. In *Stewart v. Howard*, the defendant was arrested while attending as a witness. He put in a general appearance, and gave an undertaking which was perfected by the omission of the plaintiff to except to the sureties. The Court refused to discharge him. In *Cole v. McClellan*, the defendant was a Counsellor at Law and claimed that when arrested he was in attendance at Court as such. The Court recognized the doctrine of waiver. In *Brown v. Getchel*, the defendant was a party to a suit pending and in attendance in his case when arrested. He executed a bail bond that he might "have the ease and favor of his liberty." It was held that by giving the bond he waived his exemption. In *Pixley v. Winchell*, the Court held that putting in special bail was a waiver of a fatal defect in the *capias ad respondendum*, although neither the defendant nor his attorney knew of the defect; and in *Dix v. Palmer*, Justice Gridley said "the defect in the summons would be a fatal objection to the judgment, had not the defendant's attorney given a general notice of appearance, and waived the irregularity."

In the case of *The Columbian Insurance Company v. Force* (8 *How. Pr. Rep.* 353), however, the Supreme Court held that the defendant, by giving bail or procuring an undertaking, did not thereby waive his objections to the legality of the arrest, unless he did so voluntarily, and that under the former system the execution of a bond to be discharged from arrest by the defendant himself, did not have that effect. The distinction, however, between a bail bond under that system, and an undertaking under the Code, was not noticed in that case. There is a wide difference. The present undertaking is a substitute for the special bail, which followed the bail bond necessarily under the old system. We find also that in

the cases of *Reynolds v. Rankin*, (4 Barn. & Ald. 536); *Tayler v. Rutherman* (6 J. B. Moore, 264); *Fahrbroh v. Solbers*, (10 Id. 322); *McBeath v. Chatterly* (2 Dow. & Ry., 237), each of the defendants was arrested on a *capias* issued against him by initials of his *Christian* name, and when arrested, each defendant executed a bail bond by the name as written in the *capias*. The courts held the arrests in each case to be irregular, and ordered the bond given to be cancelled, and the defendant discharged, on entering a common appearance, thus, in effect, declaring that giving a bail bond was not a waiver of the right to question the legality of the arrest. In *Tayler v. Rutherman*, the court were of the opinion that the bail bond was given by the defendant under duress, that is, not voluntarily, and that the irregularity was not waived. This examination of cases affecting the subject under consideration, would seem to show a want of harmony in them; but such is not necessarily the case, inasmuch as it must be remarked that neither in the case of *The Col. Ins. Co. v. Force*, nor in any of the cases just referred to, did the exemption from arrest exist. They are not authorities, therefore, against the proposition that in cases of privilege, the exemption may be waived in the manner stated. They sustain the declaration of the court in *The Col. Ins. Co. v. Force*, that the giving of a bond under the former system did not always have the effect of waiving objections to the legality of the arrest, but that is their full scope. But assuming that they are analogous cases in principle, then it cannot be gainsayed that the weight of authority in this State sustains the doctrine that the exemption from arrest, which is but temporary, may be waived. The Code is silent upon the subject. Section 204 relates only to applications to discharge the *order* of arrest which may be made at any time before judgment. This is a very different application. Here the order is not assailed, but the arrest made under its authority at a time when it could not be enforced. The defendant on his arrest, gave an undertaking, and when his sureties were excepted to, gave notice of justification. That they failed to justify is no fault of the plaintiff. The defendant did all that he could in that particular proceeding to perfect his bail. If he did not intend to waive his privilege, he should have moved for his discharge, at least after he gave the undertaking. It was an idle ceremony to go on with the perfection of his bail, unless he intended to submit to his arrest as

proper. Neither his adversary nor this court should be subjected to unnecessary formula. His personal privilege concerned himself, and if he intended to enforce it, he should have done so diligently. It was but a temporary right which did not shield him longer than it continued, and was an interruption of the administration of justice which we are not bound to enlarge by a departure from well established principles.

I think the order appealed from, therefore, should be affirmed. The order made at Special Term requiring the attendance of the defendant, disproves the truthfulness of any suggestion that he was decoyed into the jurisdiction of this court by a trick, and therefore that suggestion is not worthy of serious consideration. The defendant was temporarily absent from this city, which was his place of residence, and left it on his arrest after election day. Why he left it, is apparent from the disclosures made in this case. With that, however, we have nothing to do on this appeal.

The order appealed from should be affirmed, with ten dollars costs.

SUPREME COURT.

KEYSER v. WATERBURY.

(7 Barb., 650. Decided 1850.)

Where a constable has taken property upon an attachment issued by a justice, he is bound to release the same on being served with a certificate that an appeal has been duly made, from the judgment of the justice; in the same manner as if the property had been seized by him upon an execution.

* * * * *

H. S. Knowles, for the defendant.

James & Brown, for the plaintiff.

By the Court, HAND, J. By the statute all proceedings on the judgment are suspended by an appeal (2 R. S. 259, § 192), and on a certificate that an appeal has been duly made being presented to the constable holding the execution, he shall forthwith release the

goods and chattels of the appellant, or his body if he has been taken; and if in jail he is thereupon to be released. (*Id.* § 193.) The attachment requires the officer to take the goods and chattels of the defendant "and safely to keep the same, in order to satisfy any judgment that may be recovered on such attachment." (2 *R. S.* 230, § 30.) But the officer shall not remove the goods, &c. if a bond is given that the goods shall be produced to satisfy any execution to be issued within six months. (*Id.* § 32.) If taken, the officer is to safely keep such part of the goods as shall be sufficient to satisfy the demand of the plaintiff. In *Seymour v. Dascomb* (12 *Wend.*, 584), it was held that a constable who has received the amount of an execution from the party appealing, may, on the appeal being perfected, pay it back. In *Wilson v. Williams* (18 *Id.* 581), it was held that the officer is bound to release the property on the presentation of a certificate that a writ of *certiorari* has been brought, the same as on an appeal. But Nelson, C. J. would not then say how it would be if taken on an attachment. That he considered a *casus omissus* in the statute. But I do not see why the rule should not be the same when goods are held on an attachment, as when held on an execution. In both cases the property is taken and held as security for the demand. It would seem that even in an attachment suit, if the plaintiff levy his execution before the appeal, the property must be released from the execution by the express provisions of the statute; and there is no good reason why it should be discharged from that, and held on the attachment. Indeed it may be doubted whether the attachment is not wholly *functus officio* as soon as an execution in the same suit is levied on the same property. The appellant gives a bond with surties, which is supposed to make the appellant safe. This part of the case is clearly with the plaintiff.

* * * * *

SUPREME COURT.

CLARK v. LUCE.

(15 *Wend.*, 479. *Decided* 1836.)

The *summons* or *attachment* authorized by the 33d section of the *act to abolish imprisonment, &c.*, may issue from a justice's court, *without any affidavit whatever*, against a *defendant residing out of the county* in which process is asked.

ERROR from the Montgomery common pleas. On the 6th July, 1833, Luce sued out an *attachment* against Clark under the *thirty-third* section of the *act to abolish imprisonment, &c.*, *Session Laws of 1831, p. 403*, which was issued by a justice of the peace of the county of Monroe, founded on an affidavit of Luce that Clark was a *non-resident* of that county, and was indebted to him in the sum of about \$50, over and above all discounts, and that such indebtedness arose on contract. On the return day of the attachment, the plaintiff declared for the rent of a house and lot, and the defendant *pleaded in abatement*, 1. That the *affidavit* made by the plaintiff was not conformable to the requirements of the statute; 2. A plea substantially like the first; and 3. That on the same day the *attachment* was issued, a *summons* was also issued at the suit of the plaintiff against the defendant, both being tested and made returnable on the same day, both being founded on the same affidavit, and that both processes were served. To these pleas the plaintiff *demurred*, the defendant joined in demurrer, and the justice decided the pleas to be insufficient. The defendant then pleaded the *general issue*, and after trial the justice rendered judgment for the plaintiff. The defendant appealed to the Monroe common pleas, where the cause was tried on the *issue of fact*, and a verdict rendered by the jury for the plaintiff. The common pleas also passed upon the *issues of law*, and adjudged the pleas to be bad, and judgment was accordingly rendered for the amount of the verdict and costs. The defendant sued out a writ of error.

P. G. Buchan and *H. Gay*, for the plaintiff in error.

H. Humphrey, for the defendant in error.

By the Court, SAVAGE, Ch. J. The regularity of the issuing of the attachment is the principal, perhaps the only point in the case. It was issued under the 33d section of the act of 1831; but it is necessary to refer to some of the previous sections. The 30th section prohibits imprisonment upon execution on justices' judgments, except in four cases: 1. Where the person against whom it issues has not resided within this State for 30 days before suit commenced; 2. Where the judgment was for money collected as a public officer; 3. For official misconduct or a neglect of duty; 4. For damages for misconduct or neglect in any professional employment. The 31st section declares that no warrant shall issue in any case, except where an execution may issue to *imprison* the person; a warrant issues under this statute in the four cases above specified. The 32d section provides, that where a warrant cannot issue, a non-resident plaintiff on certain proof and security, may have a summons returnable in not less than two and not more than four days. The 33d section is as follows: "Whenever, by the provisions of the 30th section of this act, no warrant can issue, and the *defendant shall reside out of the county*, he shall be proceeded against by *summons* or *attachment*, returnable not less than two nor more than four days from the date thereof, which shall be served at least two days before the time of appearance mentioned therein; and if such defendant be proceeded against otherwise, the justice shall have no jurisdiction of the cause." The 34th section enumerates certain cases in addition to those in which attachments might previously issue, and the 35th section prescribes the evidence upon which an attachment may issue *in such case*, or in the cases provided for in the revised statutes; but the case embraced in the 33d section seems to be not included amongst any of those requirements. A bond is required in the cases provided for by this act, with sureties, and upon the conditions prescribed by the revised statutes.

Before the act of 1831, the process against non-resident debtors was by warrant; and if judgment was obtained and property was not turned out upon execution, the defendant was imprisoned; but when imprisonment for debt was abolished, it seemed proper that an arrest should be dispensed with, in all cases where the party could not be imprisoned upon final process. Hence the 33d section does not *allow* the summons or attachment, in cases where

the defendant is liable to be imprisoned, because in such cases a warrant may be issued; but when a warrant can not be issued, this statute intended to give a more summary and effectual remedy than against residents of the county; and therefore, as I apprehend, left the plaintiff to take an attachment against a defendant who is not a resident of the county, but is a resident of the State, as a substitute for a warrant under the former statute—and to be issued in the same manner, at the peril of the plaintiff. So it was formerly as to the issuing of the warrant against a non-resident defendant. No affidavit was necessary. The plaintiff issued his warrant at his peril; if it turned out that the defendant was not a non-resident of the county, the proceeding was irregular. So also formerly, a warrant could not be issued against a freeholder or inhabitant having a family, except under certain circumstances—and those circumstances must be shown, in order to justify the issuing of the warrant; but against persons not inhabitants, or if inhabitants and not freeholders nor having families, a warrant issued as a matter of course—as much so as a summons. No affidavit was required. As the statute does not now require an affidavit, none is necessary in this case.

The issuing a *summons* at the same time with the *attachment* could not operate as a bar to the suit upon the attachment, even if both were for the same cause of action (which however is not averred). The plaintiff had a right to go on with the suit commenced by attachment, and subsequently discontinue the suit commenced by summons.

The common pleas decided correctly, and their judgment must be affirmed.

SUPREME COURT.

WEBBER AND HAND v. GAY AND EYSAMAN.

(24 Wend., 484. Decided 1840.)

L. Ford, for the defendant.

T. Jenkins, for the plaintiff.

By the Court, NELSON, Ch. J. It was decided in *Clark v. Luce*, 15 Wendell, 479, that an attachment under the 33d section of the act of 1831, *Statutes of 1831*, p. 403, might issue against non-residents of the county without any affidavit. In terms, however, the attachment must be returnable in not less than two days, and must not run more than four days from its date. And if a defendant be proceeded against otherwise, the statute declares *the justice shall have no jurisdiction*.

The counsel for the defendants insist that in this case the attachment was issued under the 34th section, and if so, the return is undoubtedly regular. If it may be issued against non-residents of the county under this section, the preliminary steps before the justice are probably sufficient, though the affidavit is quite meagre. That section provides, that in addition to the cases in which a suit may be commenced under the revised statutes by attachment before a justice, (this is the import,) it may be so commenced for the recovery of a debt not exceeding \$50, whenever it shall satisfactorily appear to the justice, that the *defendant is about to remove from the county his property, &c. whether such defendant be a resident of the State or not*. The language doubtless is broad enough to embrace the case of non-resident defendants; but I think it should be construed as intended to apply, exclusively, to residents of the county. The previous section had already provided for the former, and, as has been held in *Clark v. Luce*, authorizes the issuing without any preliminary proceedings. The 34th section, therefore, could not have intended to prescribe a like remedy, fettered with these proceedings, for the sake of affording the alternative to the creditor; it would have been worse than useless. As some of the previous provisions recognized a distinction in legal proceedings before the justice favorable to residents of the State, the clause was, probably, thrown in for the purpose of repu-

diating it in the particular case. The limitation of time in the return of the attachment against non-residents, was to afford a speedy opportunity for trial; was intended for their convenience, and should be upheld if possible, consistent with a reasonable interpretation of the several provisions.

2. I think the learned judge erred as to the officer. I am not aware the court has ever looked beyond the process with a view to see if he was cognizant of the irregularity. The point was thrown out by the chancellor in *Parker v. Walrod*, 16 *Wendell*, 519, but no definite opinion expressed. The general rule there admitted is, if the justice has jurisdiction of the subject-matter, and if the process is regular upon its face, he is protected. To go beyond this, would lead to a new and troublesome issue, which would tend greatly to weaken the reasonable protection to ministerial officers. Their duties, at best, are sufficiently embarrassing and responsible; to require them to act or not, at their peril, as they may be supposed to know or not the technical regularity of the party or magistrate, seems to me an innovation upon previous cases, and against the reasons and policy of the rule. The experience of the officer will soon enable him to determine whether the process is in regular form or not, or he can readily obtain the necessary advice; but he must be presumed wiser than the magistrate if even a knowledge of the proceedings would enable him to decide correctly, if they happened to be erroneous. I think a new trial should be granted as to the officer.

SUPREME COURT.

DOWD v. STALL.

(5 *Hill*, 186. *Decided* 1843.)

Prior to the act of April 25th, 1840 (*Sess. L. of 1840*, p. 125), a person residing out of the State could not be sued in a justice's court by *short summons*, but only by warrant.

Whether, since the act above referred to, there be any process by which a suit can be commenced in a justice's court against a non-resident of the State, on a demand arising upon contract, *quære*.

ERROR to the Dutchess C. P. Stall sued Dowd in October, 1838; before a justice of the peace, for goods sold and delivered. He

made affidavit before the justice that Dowd was justly indebted to him, and *resided out of the State*. A summons was issued on the 15th, returnable the 18th of October, 1838, and was served the day it issued. The plaintiff appeared, but the defendant did not appear. The declaration was for goods sold and delivered, and after hearing evidence the justice rendered judgment for the plaintiff. On *certiorari* the C. P. affirmed the judgment; and the defendant sued out a writ of error.

W. Reynolds, for the plaintiff in error.

W. Eno, for the defendant in error.

By the Court, BRONSON, J. The revised statutes provide that "no person shall be proceeded against by summons out of the county in which he resides." (2 R. S. 227, § 13.) The first process is a warrant. (§ 17.) The rule was altered by the non-imprisonment act of 1831, and a short summons was substituted for the warrant. But the provision did not extend to persons residing out of the State. (*Stat. of 1831*, p. 396, § 1, 2, and p. 403, § 30, 31, 33.) Persons residing in the State, but in a different county from the justice, must be proceeded against by short summons. But the act of 1831 left the revised statutes in full force as to persons residing out of the State; and down to 1840 (*Stat. of 1840*, p. 120, ch. 165), they could only be proceeded against by warrant. This suit was brought in 1838, and as the defendant was not a resident of the State, the justice acquired no jurisdiction. In *Hoose v. Sherrill* (16 Wend., 33), it did not appear that the person sued was a non-resident; and besides, that was an attempt to charge the justice as a trespasser, and courts are strongly disposed to protect public officers where they have fallen into honest error. Here, the only question is whether the judgment is erroneous, and about that question there can be no doubt.

It is difficult to tell how a resident of *another State* can now be sued in a justice's court. The act of 1830 forbids that he should be sued by summons, and the act of 1840 virtually forbids his being sued by warrant. But it will be time enough to consider that question when it arises. When this suit was brought the defendant might and should have been sued by warrant.

Judgment reversed.

The following Cases were reported after the text of this book was printed.

COMMISSION OF APPEALS.

HIRAM SCHOONMAKER *et al.*, Appellants, v. JAMES SPENCER, Respondent.

JOHN DERREENBACKER *et al.*, Appellants, v. THE SAME, Respondent.

(54 *New-York Rep.*, 366. *Decided* 1873.)

It is the uniform practice of the courts in reviewing proceedings had before a justice of the peace, if possible, to sustain them by every reasonable and warrantable intendment.

In order to give a justice of the peace jurisdiction of an action commenced by attachment, the creditor is not required to furnish conclusive evidence of the facts relied on. It is sufficient if the proof has a legal tendency to make out, in all its parts, a case for the issuing of the attachment; and if the facts and circumstances disclosed fairly call upon the magistrate for the exercise of his judgment, the proceedings are not void. To defeat his jurisdiction it must be made to appear that there is a total want of evidence upon some particular point. The rule is the same, whether the question arises in a direct or in a collateral proceeding. (*Johnson, C., dissenting.*)

An attachment was issued by a justice, upon the ground that defendant had departed from the county and State with intent to defraud his creditors. It was founded upon affidavits which, after stating the indebtedness and the grounds of the application, stated, in substance, that defendant bought the goods, the subject of the indebtedness, upon a credit of thirty days, upon a false representation that he was in the habit of purchasing for cash and that his stock was paid for; that soon after and before the credit expired he departed, and has not since returned; that his stock was running down and disappearing, and that, as far as plaintiff could learn from other creditors, it was all purchased on credit, and not paid for; that defendant's agent refused to do anything toward paying or securing plaintiff's debt; and that, as plaintiff believed, defendant had departed with intent to defraud his creditors, *held* (*Johnson, C., dissenting*), that the proof was sufficient to give the justice jurisdiction.

APPEALS from judgments of the General Term of the Supreme Court in the third judicial district, affirming judgments of the County Court of Ulster county, which reversed judgments of a Justice's Court in favor of plaintiffs.

These actions were commenced by attachment under the provisions of 2 Revised Statutes (*p.* 230, §§ 26, 27, 28) upon the ground that defendant had departed from the county of Ulster,

where he last resided, and from the State, with intent to defraud his creditors.

The only questions presented were as to the jurisdiction of the justice to issue the attachments. The facts pertinent thereto sufficiently appear in the opinion.

S. L. Stebbins, for the appellants.

A. T. Clearwater, for the respondent.

REYNOLDS, *C.* These cases were heard together as one cause as there is no substantial difference between them, and they are in brief this: Suits by attachment were commenced against the defendant before a justice of the peace in Ulster county, upon the ground that he had departed from the county of Ulster, where he last resided, and from the State of New York, to defraud his creditors, and the question is whether the affidavits upon which the attachments were issued gave the justice jurisdiction. Judgments were given for the plaintiff by the justice, which were reversed by the County Court of Ulster county. Upon appeal to the Supreme Court the judgment of the County Court was affirmed, and upon leave duly granted, we have the cases before us for final decision.

The affidavits upon which the attachment in the case of Schoonmaker was issued, sworn to August 3d, 1863, sufficiently stated that the defendant was at the time indebted to his firm upon contract, in the sum of \$142.50, and, thereupon, he applied for an attachment on the ground that Spencer had departed from the county of Ulster, where he last resided, and from the State of New York, with intent to defraud his creditors. It is then stated, that on the 17th of June, 1863, Spencer purchased the goods of the plaintiffs to the amount of \$142.50 on a credit of thirty days, and upon the false representation that he was in the habit of purchasing for cash only, and that his stock in business was paid for. It is further sworn, that soon after this purchase, and before the thirty days' credit expired, Spencer departed and had not since returned. That his stock in his store or place of business was running down and disappearing, and that so far as the plaintiff Schoonmaker could learn from other creditors, it was all purchased

on credit and not paid for, and it is further added that the agent of Spencer refused to do anything toward paying or securing the plaintiff's debt, and they believe that the said Spencer departed with the intent to defraud his creditors, and that Schoonmaker & Co. would be in danger of losing their debt unless an attachment issued.

In the case of Derrenbacker, the affidavit showed a demand of \$78.30 or more, and that the attachment was applied for upon the same ground as in the case of Schoonmaker. It is added also, that the goods were purchased on the 12th of June, 1863, to be paid for on the first of July then next. It is then averred, that Spencer then and there falsely represented that he was in the habit of purchasing his goods for cash, and that his stock was fully paid for. That at the time Spencer purchased other merchandise of different persons on credit, and on like representations, and was at the time indebted to more than the value of his property. It was further said in the affidavit of Stephen, in the suit last mentioned, that in the preceding month of June, Spencer left the county on pretence of a few days' absence, and had not returned when, on the fourth of August, the affidavit was made. It is then further added that the deponent believed that Spencer continued absent with an intent to defraud. It is to be also said that the defendant did not appear in the Justice's Court, and the judgment of that court in favor of the plaintiff has been reversed for want of jurisdiction, and that is the question we are now called upon to consider.

In order to defeat the jurisdiction of the justice, it must be made to appear that there is a total want of evidence upon some essential point. The creditor is not required to furnish conclusive evidence of the facts relied on, but it is sufficient if the proof had a legal tendency to make out in all its parts a case for the issuing of an attachment, and as the question is one of jurisdiction, I am not able to see why any different rule applies, whether it arises in a direct or collateral proceeding. The *dicta* to the contrary appear to me groundless. If the facts and circumstances disclosed fairly called upon the magistrate for an exercise of his judgment upon the weight of the evidence, even if he err, the proceedings will not be void for want of jurisdiction, no matter in what form the question is presented. (*Matter of Faulkner*, 4 Hill, 598; *Van*

Alstyne v. Erwine, Sheriff, 11 N. Y., 381.) This rule of construction does not appear to have been seriously questioned for thirty years, and has been reaffirmed and approved in very many adjudged cases. It has also been the uniform practice of the courts in reviewing the proceedings had before justices of the peace, to regard them with marked indulgence and liberality in the furtherance of the ends of justice, and, if possible, sustain them by every reasonable and warrantable intendment. It appears to me that the Supreme Court applied a very different rule to the case before us, and for that, among other reasons, I am not able to concur in the judgment pronounced. It is supposed that the affidavit upon which the attachment issued in the case of Derrenbacker is somewhat feebler than that in the case of Schoonmaker, but I see no substantial difference, and, in my opinion, both are sufficient to sustain the proceedings of the justice. There was no question in either case in respect to the fact of the existence of the debt. In the one case it was contracted on the 12th of June, 1863, to be paid on the 1st of July following, and in the other, on the 17th of June, upon a credit of thirty days. The application was made in each case on the following 4th of August, upon the ground that Spencer had departed from the county of Ulster, where he last resided, and from the State of New York, with intent to defraud his creditors. The affidavit of Schoonmaker states positively that Spencer purchased the goods "on the false representations that he was in the habit of purchasing for cash only, and that his stock in business was paid for." Here, certainly, is proof that the goods were obtained upon false representations. It is further added in the affidavit "that very soon after such purchase, and long before said thirty days expired, he departed as aforesaid and has not since returned; that the stock in his store or place of business is running down and disappearing." It is then added that the stock of Spencer, so far as can be learned from his other creditors, was all purchased on credit and not paid for, and it is further positively averred "that the agent of the said Spencer refuses to sell or turn out any of said stock toward the payment of the demand of H. Schoonmaker & Co., and that the stock of said Spencer on hand is insufficient to pay his indebtedness," and then follows the belief of the deponent that the departure was with the intent to defraud.

The learned judge who delivered the opinion in the Supreme

Court could discover nothing in the affidavit inconsistent with the departure of the defendant with an honest intent. It is said, for aught appearing in the affidavit, he may have gone off openly, and was detained by illness, and it seems to have been assumed that a creditor applying for an attachment under such circumstances must clearly negative all suspicion of honesty. This is not the rule, and the assumption has neither reason nor authority to support it. The defendant having contracted debts upon false representations, departs from his residence and place of business, in the county of Ulster, and from the State, and is absent for about six weeks, without any explanation. In the meantime a clerk disposes of the stock in trade; refuses to apply any thing upon over-due demands, and the defendant, by the Supreme Court, is supposed without any proof, to be still on his travels for pleasure or detained by serious affliction. If the facts alleged are not some evidence of departure with a fraudulent intent it will, in my judgment, be difficult to say what evidence will be sufficient for that purpose. It appears to me that the rule adopted by the Supreme Court is precisely the reverse of what the law approves. Everything is assumed in favor of the honesty of the fugitive debtor and nothing to be taken for granted in favor of the unhappy creditor. The learned judge says that every fact stated in the affidavits may be true, and yet the departure of the defendant may have been honest, and his failure to return caused by failing health or serious illness. In applications for attachments against the property of concealed absconding debtors under 2 Revised Statutes (3, § 4; *id.*, 13, § 62), it is required that the application of the creditors shall be supported by the affidavits of two *disinterested* witnesses, who verify and support, by facts and circumstances, the grounds of the application. Yet it was held by the Court of Appeals, that it need not be affirmatively proved that the witnesses thus relied on were, in fact, *disinterested*. That would be assumed until the contrary was shown. (*Van Alstyne v. Erwine, Sheriff*, 11 N. Y., 331.) And I do not see that in this case it is to be assumed that Spencer's departure was with an honest intent, or his continued absence the result of sickness, against facts going strongly to show that he was insolvent, contracting debts upon false representations, and departed from his residence without notice, and remains absent without any explanation.

It appears to me that the Supreme Court gave undue prominence to the fact that there was no positive averment in the affidavit of Spencer's insolvency. Some facts were certainly stated that at least, might tend to move the judicial mind in that direction. The learned judge most truly says, that Spencer may have been abundantly solvent, and yet his stock on hand insufficient to pay his debts, as it does not disclose the debts due, or money or other property owned by the departing debtor. But the question really is, whether, when all the visible means and resources of a departing debtor appear to be insufficient to discharge his obligations, the courts are to assume that he had some invisible means of paying his debts. I think not. No court is required to worry itself to find excuses for a fugitive from debt. And it may be suggested that the question of insolvency, although of great importance, is not controlling. If a perfectly solvent man departs the State with the intent to defraud, his property may be attached.

Another fact seems to have been relied upon, and that is, that the affidavit does not disclose why the clerk or agent of Spencer refused to apply his property in payment of his debts. This was not required. The fact was that the refusal was made, and with other facts proven in the case, there was some evidence to show that Spencer had some prejudice against discharging his pecuniary obligations.

As has been said, it was assumed that the affidavit in the case of Derrenbacker is the stronger one, or, in the language of the learned judge, that he had "sworn a little stronger," although, as he says, it was apparent that he knew no more than the "defendant in the other case." The printer has probably substituted "defendant" for "deponent," and, I think, the Supreme Court in deciding the case, invented the rule of legal presumption.

As I am content to rest my judgment upon the weaker affidavit, without further argument, it is my opinion that the judgment of the Supreme Court and the Ulster County Court should be reversed, and that of the justice be affirmed with costs.

JOHNSON, *C.* (dissenting). The Revised Statutes give an attachment to be issued by a justice of the peace, whenever it shall satisfactorily appear to the justice that a debtor has departed or is about to depart from the county, where he last resided, with intent

to defraud his creditors, or to avoid the service of any civil process, or that such debtor keeps himself concealed with like intent. (2 R. S., 230, § 26.)

By section 28 it was required that the application should be in writing, and should be accompanied by the affidavit of the creditor or his agent, in which should be specified the "sum claimed" and "the ground upon which the application was founded." It was further required that the facts and circumstances to establish such grounds should also be verified by the affidavits of two disinterested witnesses. This provision was modified by section 35 of chapter 300 of the Laws of 1831, by which it was enacted that, before an attachment should issue, the defendant should, by his own affidavit, or that of some other person or persons, prove to the satisfaction of the justice the facts and circumstances to entitle him to the same, and that the requirement of any other or different proof by the preceding statute should be repealed. The relaxation introduced by this amendment was, that the two disinterested witnesses were dispensed with, and the plaintiff or applicant could, by his own affidavit, make the requisite proof. The same facts and circumstances were still to be proved. The settled construction of the requirements of the statute is, that when the decision of the justice is directly under review, it must appear that the proof adduced was such as judicially to satisfy him of the requisite facts, and that the justice has no right to be satisfied unless upon legal proof of facts and circumstances. (*Smith v. Luce*, 14 Wend., 237.)

That a strict compliance with the statute is essential to the protection of the rights of persons proceeded against by attachment is obvious, from the fact that the proceeding before the justice is *ex parte*, and of course there is no opportunity for cross-examination, nor for the introduction of witnesses to overthrow the case of the applicant. He can make proof himself by his own affidavit, and he has the right to the compulsory attendance and examination of any other person. Courts, therefore, are only acting in the spirit of the statute, when they require, upon the direct review of such a proceeding, satisfactory proof and not mere surmise nor ground of suspicion of acts on the part of the debtor, subjecting him to this summary and peremptory process. It is their duty to see to it that there is satisfactory proof to support the proceeding.

When the question has arisen collaterally, a laxer rule has been held, the jurisdiction of the justice being sustained when there was proof tending to establish the requisite facts, though unsatisfactory in its weight. (*Van Alstyne v. Erwine*, 11 *N. Y.*, 331; *Skinnion v. Kelley*, 18 *N. Y.*, 355.) Taking all the allegations in both the affidavits as applicable to each case, they do not, in my opinion, amount to a statement of such facts and circumstances as sustain by proof the decision of the justice. One swears that another has departed the State with intent to defraud creditors. This is not proof satisfactory unless the ground be disclosed by which the witness assumes to speak of the party's intent to defraud. If he told him so, that should be stated, and the grounds of his inference, whatever they may be, should be brought to the light to enable the justice to judge of the intent. A man is sometimes allowed to prove his own intent, that being within his own breast, but to make proof of another's intent by direct testimony that he entertained it is going beyond the limit of human knowledge. The only other facts stated are that the debtor purchased a small bill of goods from each of the plaintiffs, on a fixed and short credit; that when he purchased he said he was in the habit of purchasing for cash, and that his stock in business was paid for; that he went away in June, before the credits expired, and had not paid the bills nor returned up to the fourth of August. That, at the time of this purchase, the debtor purchased other merchandise of different persons on credit, and on the like representations; that the stock in his store was running down and disappearing, and was purchased, as the deponent learned, from other creditors, by the debtor on credit, and was not paid for; that Spencer's agent refused to sell or turn out any of the goods to pay the demands of Schoonmaker & Co., and that Spencer was largely indebted to different persons to more than the value of his property in the county. This omitting the epithet false, by which Spencer's alleged representation was characterized, and omitting the statement that the applicants verily believed him absent with a fraudulent intent, is the whole so-called proof. There is no pretence of any endeavor to ascertain where Spencer was, or any alleged reason for his absence. There was his clerk or agent who could have been examined, and might probably have given a satisfactory explanation. The purchases from different persons, on representations of

some sort, are left to rest on hearsay, as well as what representations he in fact made to such persons, if any. The creditors from whom the affiants learned facts deposed to are not called. His large indebtedness beyond the value of his property in the county, is obviously hearsay and unsupported by any definite statements. Take the statement that his stock was running down and disappearing, it is entirely consistent with daily sales and realization in money by the clerk or his employer. That his clerk would not turn out goods in payment may have been from lack of authority and absence of instructions from the debtor. The whole together, hearsay and all, amounts to no more than a case of suspicion. It might possibly suffice, on a collateral inquiry, to make out jurisdiction and save an officer from liability as a trespasser, but on a direct review it ought to be pronounced unsatisfactory as proof of facts and circumstances to sustain the process.

The judgment of the Supreme Court ought to be affirmed.

All concur with REYNOLDS, C., for reversal, except JOHNSON, C., dissenting.

Judgment of General Term and of County Court reversed and judgment of justice affirmed.

SUPREME COURT.

KETCHUM, Appellant, v. VIDVARD.

(4 *New-York Supreme Court Rep.*, 138. *Decided* 1874.)

Where, in an affidavit, on application for an attachment under the non-imprisonment act, the affiant states that the defendant has left the county and removed his property therefrom; *held*, that such proof is sufficient. The county intended in the statute is the county in which the process is applied for, and it is not necessary that the plaintiff should prove that the removal of property was from the county where the defendant last resided.

Where a justice of the peace construed the meaning of an affidavit for an attachment to be that the county of Oneida was the last place of residence of the defendant, he acquired jurisdiction, and in a collateral proceeding the attachment could not be held void.

The intent with which a defendant removes his property, may be stated in his

affidavit on information and belief: and where in an affidavit for an attachment it was stated on information and belief that the defendant had gone west to reside, it was held that this fact was properly so stated.

THIS was an appeal from an order denying a new trial upon the minutes of the court. The action was brought against the defendant for the conversion of certain personal property owned by the plaintiff. The act of conversion was the seizure of the property by virtue of an attachment issued by a justice of the peace of the county of Oneida against Thomas Clark.

The plaintiff claimed that at the time the property was seized he was the owner of it by virtue of a sale to him by Clark. The defendants alleged that this sale was void because it was made by Clark to defraud his creditors. On the trial the plaintiff objected to the admission in evidence of the attachment proceedings, because the attachment affidavit did not state the county where the defendant resided nor whether he was a resident of the State or not. The court admitted the evidence.

The affidavit upon which the attachment was granted read as follows: "Oneida County, ss: John H. Sheehan, being duly sworn, deposes and says that Thomas Clark is justly indebted to him and Peter Vidvard in the sum of one hundred and thirty-five and twenty-five one-hundredths dollars or more, over and above all discounts which the said Thomas Clark may have against him, as near as he can ascertain the same, which said debt arose upon contract; and deponent further says that the said Clark has left the county of Oneida and removed his property therefrom with intent to defraud his creditors, as deponent verily believes; and deponent further saith that the facts and circumstances upon which he founds his said belief that the said Clark is indebted to considerable amounts to sundry persons, and has recently, secretly and in a clandestine manner, absconded from the county of Oneida, and taken his goods and property with him, and does not intend to return thereto, but has gone to the west to reside, as deponent has been informed and believes."

Walter Ballou, for appellant.

S. J. Barrows, for respondents.

MULLIN, P. J. The attachment in this case was issued pursuant to the provisions of the non-imprisonment act (*Laws* 1831, *chap.* 300, §§ 34-39), so called, and not pursuant to the provisions of the Revised Statutes relating to the commencement of suits in justices' courts, by attachment. 2 *R. S.* 230, §§ 26-38.

By the former provisions, an attachment might issue whenever it was made to appear to the satisfaction of the justice that the defendant was about to remove from the county any of his property with intent to defraud his creditors, or has assigned, etc., any of his property with like intent, whether such defendant be a resident of this State or not.

The specific objection to the affidavit on which the attachment issued is, that it does not state that Clark had left the county where he last resided, or that he was about to remove from the county any of his property. Whether Clark had, or had not, left the county, was matter of no moment, as the attachment was not issued under the section of the Revised Statutes above referred to.

What county is intended in this section of the non-imprisonment act, where the applicant is required to prove, to the satisfaction of the justice, that the defendant is about to remove from the county any of his property, is not quite clear. If the defendant is a non-resident of the State, as he may be, and yet be proceeded against under this provision of the statute, it would be difficult to ascertain the county in this State in which he last resided. It would seem to me the county intended is the county in which the process is applied for, and that it is not necessary that the plaintiff should prove that the removal of property was from the county where the defendant last resided.

There is another answer to the objection. The affidavit, taken all together, contains evidence which justifies the justice in finding that the county of Oneida was the county where the defendant last resided. The affiant says: "that Clark has left the county of Oneida, and removed his property therefrom, with intent, etc.; said Clark is indebted in considerable amounts to sundry persons, and has recently, secretly and in a clandestine manner absconded from the county of Oneida and taken his goods and property with him and does not intend to return thereto, but has gone to the west to reside."

It is true the facts sworn to might be true and yet the defendant

be a resident of some other county, but the question is, what was the justice authorized to infer the party intended in view of the statutory requirement?

If the justice might construe the affidavit as meaning that the county of Oneida was the last place of residence of the defendant, the justice acquired jurisdiction, and the attachment cannot be held void in a collateral proceeding. 2 *Wait's L. & P.* 14, 139 and 144, and cases there cited.

It is also objected that the facts are stated in the affidavit on information and belief. The clause as to the intent with which the defendant removed his property is, as it may properly be, on information and belief, and that defendant had gone west to reside is also on information and belief, as it may also be properly stated, and these are the only allegations that are thus made, according to my construction of the affidavit.

* * * * *

Judgment affirmed.

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ERRATA.

Page 26, line 25, after "satisfied," add *judicially*.
Page 76, line 17, for "*Wend.*," read *John*.

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